CURRENT TRENDS IN FOREIGN BRIBERY INVESTIGATION AND PROSECUTION

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FACTI PANEL BACKGROUND PAPER 6
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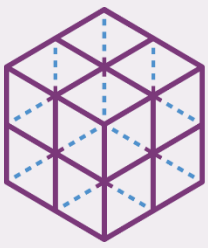
This background paper was commissioned to support the FACTI Panel's deliberations and will be used to inform the Panel's interim and final reports. The paper benefited from comments and contributions from the FACTI Panel members, the FACTI Panel secretariat, and staff at the UN Office of Drugs and Crime, the OECD secretariat, the UNCAC Coalition, and Ajat Bhattacharya. The views expressed in this paper are those of the author(s) and do not necessarily represent the views of the FACTI Panel, its members, the FACTI Panel Secretariat or the United Nations.



FINANCIAL ACCOUNTABILITY TRANSPARENCY & INTEGRITY

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The Conference of the States Parties to the United Nations Convention against Corruption, '*calls upon States parties to support public-private partnership in order to strengthen the understanding of both public officials and private sector actors that bribery and solicitation are unacceptable.*'
-St Petersburg Statement, Resolution 6/5[1]

1. INTRODUCTION

The African Union, in its recent report *on Illicit Financial Flows,* concluded that large commercial corporations are by far the biggest culprits of illicit outflows and that these outflows are facilitated by corrupt practices.[2] Corporations have an immense economic and social footprint. Of the world's hundred top global economic entities, sixty-nine are corporations, with just thirty-one countries on the list.[3] Finding measures to prevent corruption and provide effective, proportionate and dissuasive civil, administrative, or criminal penalties,[4] for foreign bribery is a big challenge, in the face of such power asymmetries.

Effective prosecution of foreign bribery is also hindered by a transacting environment 'with many cracks and places to hide'. It is delocalized and has no central nexus of governance. It is fragmented, consisting of countries at different levels of economic development, with competing cultures and diverse criminal justice systems. Furthermore, the monopoly of the state to initiate criminal law enforcement often translates into a reluctance to prosecute domestic companies or persons, and, paradoxically, the criminal justice system, in such circumstances, may provide a layer of protection to wrongdoing corporations. Another complicating factor is the fact that the state is often simultaneously a primary beneficiary of contracts facilitated by foreign bribery overseas, as well as, the primary enforcer of anti-foreign bribery laws. Acting against corruption may mean acting against its own political short-term interests. Last but not least, information asymmetries are also quite problematic. Few States, possess the capacity or resources to detect, investigate and effectively prosecute complex, multi-jurisdictional, corrupt transactions against powerful actors with very deep pockets.

Not surprisingly, effective anti-foreign bribery enforcement is, and remains, a significant challenge. *Traditional criminal prosecution*, which can be defined as a prosecution model that focuses on punishment, *ex post,* after the act of foreign bribery has been discovered,[5] cannot be described as 'effective', 'proportionate' or 'dissuasive' where the process can be so easily subverted by the corrupt actors themselves. This turns the regulatory pyramid on its head.[6] The crimes at the top of the pyramid that wreck the most havoc on society, become the most susceptible to a lack of political will to prosecute. Against this background, this Paper reviews an emerging alternative framework for foreign bribery investigation and prosecution that has rapidly become the *primary mechanism* of anti-foreign bribery enforcement. This framework, has resulted from the 1977 US Foreign Corrupt Practices Act, which not only established the offence of foreign bribery,[7] but, also, introduced anti-foreign bribery enforcement by way of non-conviction based, non-trial resolutions (NTRs) that resolve the foreign bribery allegation

[1] St. Petersburg statement on promoting public-private partnership in the prevention of and fight against corruption, Resolution 6/5, Resolutions adopted by the Conference of the States Parties to the United Nations Convention against Corruption, https://www.unodc.org/documents/treaties/UNCAC/COSP/session6/Resolutions/V1609639e.pdf.
[2] Illicit Financial Flows: Report of the High-Level Panel on Illicit Financial Flows from Africa. Addis Ababa. © UN.ECA https://portal.africa-union.org/DVD/Documents/DOC-AU-WD/Assembly%20AU%2017%20(XXIV)%20_E.pdf .(Hereinafter ECA IFFs Report) at p,15.
[3] Global Justice Now, '69 of the richest 100 entities on the planet are corporations, not governments, figures show' 17 October 2018, https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show .
[4] Art 12 UNCAC.
[5] This is the definition adopted in all further references to *traditional criminal prosecution* in this paper.
[6] See generally I. Ayres, J. Braithwaite, *Responsive Regulation Transcending the Deregulation Debate*, Oxford University Press (1994).
[7] U.S. Foreign Corrupt Practices Act, 1977, 15 USC Sec. 78dd-1, 15 USC Sec. 78dd-2, 15 USC Sec. 78dd-3. (Hereinafter the FCPA).

before charges are filed.[8] Before giving an outline of this paper, it is good to motivate why a paper on foreign bribery investigation and prosecution focuses on NTRs.

1.1. The growth and spread of NTR regimes

US FCPA NTRs caught the attention of corporations, regardless of where they were headquartered, as they were pulled into the net of US courts by FCPA long arm jurisdiction. The multinational corporation operates in the transnational space of an integrated global market. Therefore, incentives to induce compliance, adopted in a jurisdiction with regulatory control, will inevitably seep through the transnational space occupied by the multinational corporation, regardless, or in spite of, the overlying criminal justice principles or systems of any one country. This was the case with the US FCPA which cast a long shadow as its influence spread across the global market.

The FCPA arguably encouraged the introduction of new corporate liability for bribery regimes in several countries structured on rewarding self-reporting and cooperation with prosecuting authorities. A good example, is the new corporate bribery offence, introduced in the UK in 2010.[9] Compliance is encouraged by the possibility of a *compliance defence* that is contingent upon a corporation's ability to show that it put in place adequate procedures to prevent the act of bribery from occurring in the first place. In 2013, England and Wales, introduced an NTR deferred prosecution agreement regime that rewards self-reporting and voluntary disclosure.[10]

US Style NTRs are spreading globally and many countries, have, just in the last 7 years, adopted NTR regimes and/or corporate liability foreign bribery regimes that reward self-reporting and cooperation. Examples are Brazil,2014 (Administrative liability);[11] Spain,2015;[12] France,2016;[13] Colombia,2016 (Administrative liability);[14] Mexico,2017(Administrative Liability);[15] Argentina, 2018;[16] Peru,2018;[17] Japan,2018;[18] Canada,2018;[19] Singapore,2018;[20]Australia, in progress.[21] An International Bar Association 2018 Study found that, NTRs have been adopted in jurisdictions where prosecutors traditionally enjoy broad prosecutorial discretion to negotiate such a deal with alleged offenders, but, also, in jurisdictions where the principle of legality and mandatory prosecution should ostensibly have prohibited such a negotiation.[22]

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[8] Resolutions of settlements of corruption offences cover a gamut of leniency arrangements that rewards the wrongdoer for *cooperation*. Some settlements are reached within the framework of a criminal trial and are *conviction-based,* as for example, plea deals. Plea bargaining is a common feature of most criminal justice systems. However, non-trial resolutions are agreements that are reached *outside* of the criminal trial. There is no trial or requirement for a plea of guilt. For this reason, they can be referred to as *non-trial* resolutions. They include, depending on jurisdiction, deferred prosecution agreements, non-prosecution agreements, declinations or penalty notices. All further references to NTRs in this paper refer to such non-conviction-based settlements.

[9] See S.7 UK Bribery Act 2010. The UKBA is oft referred to as the '*FCPA on steroids'* and regraded to be the strictest set of anti-bribery laws in the world.

[10] Crime and Courts Act 2013 Deferred Prosecution Agreements, http://www.legislation.gov.uk/ukpga/2013/22/schedule/17/enacted .

[11] Clean Company Act 2014 (Law No. 12,846.

[12] Organic Law exemption from criminal liability based on existence of organization and management model for the prevention of crime, 2015.

[13] Law n° 2016-1691 December 9th, 2016 regarding Transparency, the Fight Against Corruption and the Modernization of Economic Life, 'convention judiciaire d'intérêt public'

[14] Law 1778 of 2016.

[15] General Law of Administrative Responsibilities, 2017.

[16] Sec. 21 of the March 1, 2018, Anti-Corruption Law 27.401 'Acuerdo de Colaboración Eficaz'

[17] Prevention models Law 30424 of January 1st, 2018.

[18] 2018 Revised System, Japan's Please bargaining System. https://www.hoganlovells.com/en/publications/japans-plea-bargaining-system

[19] Criminal Code, RSC 1985, c. C-46, Part XXII.1, "Remediation Agreements',2018.

[20] Criminal Justice Reform Act, March 2018, Deferred Prosecution Agreements.

[21] Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019.

[22] Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (The International Bar Association (IBA), Anti-Corruption Committee, Structured Criminal Settlements Sub-Committee 2018). (Hereinafter IBA Survey.) http://www.oecd.org/corruption/anti-bribery/IBA-Structured-Settlements-Report-2018.pdf. See also - Makinwa A.O., Public/Private Co-operation in Anti-Bribery Enforcement: Non-Trial Resolutions as a Solution? Tina Soreide, Abiola Makinwa, (eds) Negotiated Settlement in Bribery Cases: A Principled Approach, Elgar, 2020 at pp.48 – 55.

Box 1: The UNAOIL SAGA

The interaction between NTRs and eventual prosecution of individuals is well illustrated by the UNAOIL Case. UNAOIL, once run by the prominent Ahsani family, helped major Western companies to secure energy projects across the Middle East, Central Asia and Africa over two decades by using extensive foreign bribery schemes. In 2017, the Netherlands-based SBM Offshore, a former UNAOIL client entered into a deferred prosecution agreement (an NTR) with the US DOJ with total monetary penalties of $238 million to resolve FCPA offenses in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq. The firm also paid the SEC $5 million in September to resolve FCPA-related books and records and accounting controls offenses. Two former SBM executives pleaded guilty in the United States to bribing officials at Brazil's Petrobras and two state-owned energy firms in Africa.[1] In June 2019, TechnipFMC plc, also a former client of UNAOIL, paid the US DOJ monetary penalties of $296 million in a deferred prosecution agreement (NTR) for FCPA violations in Brazil and Iraq.[1] In March, 2016, the UK Serious Fraud Office opened an investigation into UNAOIL. On July 13, 2020, a London jury found British-Lebanese Ziad Akle, UNAOIL's former Iraq territory manager, and Stephen Whiteley, a British former manager for Iraq, Kazakhstan and Angola, guilty of plotting to make corrupt payments to secure oil contracts between 2005 and 2010.[1] The saga still continues…

This is an important trend especially when the countries where the bulk of anti-foreign bribery enforcement currently occurs are considered. TRACE International notes that from 1977 – 2019, the United States accounted for 66% of enforcement actions and Europe for 27%. Asia, the Americas and Middle East accounted for just 6% of enforcement actions.[23] This predominance of western countries is easily explained by the fact that foreign bribery is a *supply-side* bribery offence and most multinationals are headquartered in the West. Also, not surprising, given the predominance of US prosecutions and the spread of *US style* foreign bribery NTR regimes, is the fact that most anti-foreign bribery enforcement actions are undertaken by way of NTRs.[24]

NTRs grant a measure of leniency that is contingent, firstly, upon the extent to which a wrongdoing corporation *self-reports* and *cooperates* with prosecuting authorities to provide usable evidence of acts of foreign bribery *that the agency would not have discovered on its own*. This evidence also opens doors to the possible prosecution of individuals involved in the foreign bribery. Secondly, leniency in NTRs is also contingent upon the degree to which the alleged wrongdoing corporation can establish proof of mechanisms put in place to prevent acts of foreign bribery from occurring *prior* to the discovery of any corrupt activity. [25]

This focus on preventative steps, *ex ante*, is a radical and pragmatic departure from traditional criminal prosecution, that is primarily focused on punishment *ex post*. The 'carrot' for corporations is the fact that *full cooperation* and *voluntary disclosure* may trigger a presumption that the US authorities will decline to take any enforcement action against the corporation or enter into a lesser eventual sanctioning agreement with the corporation.[26] The US NTR also

[23] See TRACE, 2019 Global Enforcement Report, TRACE International 2019. At p. 7

[24] Indeed, the OECD noted in 2014 that while there had been a 'drastic increase' in the enforcement of anti-foreign bribery laws since 1999, this increase has taken place primarily outside the traditional criminal trial process. Of the 427 cases considered, in the majority of cases, sanctions were imposed by way of settlement procedures. OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, 9, (OECD Publishing 2014) at p.34; A more recent 2020 OECD report shows that 78% of foreign bribery cases were concluded by way of settlements and this constituted 82% of foreign bribery enforcement action. However, this study includes plea bargain and the conviction-based models of settlements that fall outside of the definition of NTRs adopted in this paper. See OECD Resolving Foreign Bribery Cases with Non-Trial Resolutions Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention, http://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf.

[25] See generally, US Department of Justice, A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, https://www.justice.gov/criminal-fraud/file/1292051/download.

[26] Justice Manual, Title 9, Criminal, 9-47.120 2019 FCPA Corporate Enforcement Policy. https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.110 .

regime also requires corporations to remediate and to pay all disgorgement, forfeiture, and/or restitution resulting from the foreign bribery allegation at issue.[27]

As NTRs move to the center-stage of foreign bribery enforcement, a key question that arises is, how does this mode of anti- foreign bribery enforcement promote the development agenda or stem IFFs? How does supply-side bribery enforcement using NTRs, help to overcome demand-side systemic challenges in anti-corruption enforcement, that have historically led to great acts of impunity.

1.2. Outline of this paper

This *Background Paper* on the current practice of foreign bribery prosecutions and investigations, focuses specifically on NTRs that have emerged as the predominant mode of anti-foreign bribery enforcement today. The central argument made in this paper is that NTRs are more supportive of the development agenda and should be promoted and leveraged by the FACTI Panel. NTRs have shifted the focus of anti-foreign bribery enforcement from punishment *ex post,* to corruption prevention *ex ante*. This has fundamentally changed the way corporations do business. It also addresses the impunity of the pre-NTR era. To this end, understanding how NTRs promote corruption prevention is important. So too, is an awareness of the criticisms and development gaps in the existing NTR framework. In addition, to link what has been, up till now, essentially a supply-side Western country anti-corruption enforcement tool, to demand-side anti-corruption enforcement efforts, this paper humbly provides a very preliminary proposal on how supply-side NTRs can be leveraged to develop a demand-side NTR process.

To provide some context, Section 2 of this paper examines the main ways in which foreign bribery contributes to IFFs. Section 3 examines the systemic challenges of anti-foreign bribery enforcement and the way in which the FCPA and *US Style* NTRs provide a robust response to these challenges. Section 4 examines models of NTR regimes to gain insight into how they channel corporate behaviour towards *corruption prevention*. Here, the United States as the originator of NTRs, the United Kingdom, and France are used as examples. So also, is Brazil as an example of a country with an NTR regime that operates within the administrative liability sphere. Section 5 addresses key criticisms of NTRs from the viewpoint of the rule of law and recidivism. Section 6 then highlights, development related gaps in the NTR discourse such as the position of 'victims' and the need for a demand-side bribery response. It also suggests a very preliminary framework around which a demand-side NTR regime can be structured. The paper then concludes, with short, medium and long terms proposals for strengthening the potential and impact of NTRs for foreign bribery offences in the development agenda.

2. Dramatic flows of foreign bribes

'*… the African ministers decided to investigate the matter of illicit financial outflows because of the immense developmental challenges which face the continent. For us to meet these challenges requires huge volumes of capital. Accordingly, it does not make any sense that we should be exporting capital which should be retained within our continent*.'
-Thabo Mbeki[28]

[27] Id.
[28] Speech by Thabo Mbeki, Chair of the African Union's High-level panel on illicit financial flows (IFFs) to the Pan-African Parliament, Midrand, South Africa, May 2015, https://www.corruptionwatch.org.za/mbeki-illicit-financial-flows-crippling-the-continent/

The cross-border movement of capital associated with illicit financial flows (IFFs) is a great impediment to social, political, and economic development in developing countries.[29] Illicit flows originating from these countries, that are urgently in need of social and economic development, end up in 'safe havens' in primarily Western countries.[30] This results in a perverse situation where Africa, is in terms of estimated IFFs, a *de facto* net creditor rather than a *de jure* net debtor to Western financial institutions and agencies. IFFs are estimated to likely exceed Africa's official development assistance aid and investment flows in volume.[31]

There is a lot of debate regarding the exact scale, level, socio-economic costs, and, effects of foreign bribery[32] and IFFs.[33] Nonetheless, it is well accepted that IFFs have devastating effects on developing countries.[34] Total annual illicit financial flows, according to the Economic Commission for Africa is estimated at $50 billion.[35] The Commission notes that this estimate may actually fall short of the actual figure, as accurate data is lacking for all African countries.[36] The OECD notes that IFFs originating in developing countries – from money laundering, tax evasion and bribery – often reach OECD countries. Recognizing these risks, OECD countries are taking action to avoid being safe havens for IFFs.[37] Foreign bribery, is interwoven in the developmental challenges that result from, or are exacerbated by IFFs. For this reason, reducing the level of bribery and corruption is specifically mentioned as one of the Sustainable Development Goals. This is even more urgent in a world decimated by Covid-19. [38]

A useful quick visual representation of the sheer scale of foreign bribery may be found by looking at the now famous 'Top Ten' FCPA settlements as recorded by the FCPA Blog.[39] Settlements are linked to the extent of the bribery scheme, as well as, to other factors identified in section 4 of this paper. These numbers, which are seriously significant, reflect a huge flow of

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[29] Reuter, P. (2011), Draining Development? Controlling Flows of Illicit Funds from Developing Countries, The World Bank, Washington DC.; UNDP (2011), Illicit Financial Flows from the Least Developed Countries 1990-2008, UNDP, New York, NY, available at http://astm.lu/report-illicit-financial-flows-from-the-least-developed-countries-1990-2008/; OECD, Illicit Financial Flows from Developing Countries: Measuring OECD Responses, OECD, 2014. Hereinafter the OECD IFFs Report., https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf; The United Nations Economic Commission for Africa's High-Level Panel on Illicit Financial Flows has estimated that illicit financial flows (IFFs) from Africa could amount to as much as USD 50 billion (US dollars) per year. See ECA IFFs Report, Note 2 above at p.13.

[30] OECD IFFs Report (note 32 above)p.15.

[31] Id. Se also ECA IFFs Report (note 2 above) p.2.

[32] Francisco - Javier Urra, 'Assessing Corruption: An Analytic Review of Corruption Measurement and its Problems: Perception, Error and Utility', Edmund A. Walsh School of Foreign Service Georgetown University, (May 2007); Jens Christopher Andvig, 'A house of straw, sticks or bricks'? Some notes on corruption empirics, Norwegian Institute of International Affairs, 678, 2005, https://nupi.brage.unit.no/nupi-xmlui/bitstream/handle/11250/2395390/WP_nr678_05_Andvig.pdf?sequence=3; Matthew Stephenson, Where Does the $2.6 Trillion Corruption Cost Estimate Come From? GAB The Global Anticorruption Blog, 2015, https://globalanticorruptionblog.com/2015/12/22/where-does-the-2-6-trillion-corruption-cost-estimate-come-from/; Paul. M. Heywood, Jonathan Rose, 'Close but no Cigar " : the measurement of corruption, Journal of Public Policy, Volume 34, Issue 3 , December 2014 , pp. 507-529; Jens Chr. Andvig; Odd-Helge Fjeldstad; Inge Amundsen; Tone Sissener; Tina Søreide, Research on Corruption. A Policy Oriented Survey (2000), Chr. Michelsen Institute (CMI Commissioned Reports) 158 p. (Commissioned by Norad), https://www.cmi.no/publications/5609-research-on-corruption-a-policy-oriented-survey

[33] 'Currently, no single tool or process can effectively establish a comprehensive measure of illicit financial flows (IFFs) at the global or country level.' See FACTI panel Background Paper, Overview of Existing International Institutional and Legal Frameworks related to Financial Accountability, Transparency and Integrity, 6th April, 2020, https://assets.website-files.com/5e0bd9edab846816e263d633/5e8df72aec8ff1144d3773f3_FACTI%20BP%201%20Overview%20of%20frameworks.pdf p.18

[34] 'Although the figures on IFFs are heavily disputed, current analyses agree that IFFs exceed the amount of Overseas Development Assistance (ODA) provided to Africa'. See OECD, Illicit Financial Flows: The Economy of Illicit Trade in West Africa Report Executive Summary, https://www.oecd-ilibrary.org/docserver/9789264268418-en.pdf?expires=1592642595&id=id&accname=guest&checksum=7647FAD90013F9E3786969A782EB6579 at p.13

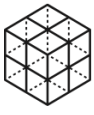
[35] ECA IFFs Report (Note 2 above) p.2

[36] Id.

[37] Id.; See also OECD, IFFs Report (Note 32 above) at p. 18; OECD countries also account for nearly 90% of global outward flows of foreign direct investment (FDI) see p. 74

[38] The OECD its policy response to the Corona Virus notes that, 'The coronavirus (COVID-19) crisis has brought about unprecedented challenges of human suffering, uncertainty and major economic disruption on a global scale. This can create environments that are ripe for corruption and bribery. For this reason, state and private sector responses to this crisis should include mechanisms for preventing, detecting and prosecuting corruption and bribery.' OECD Policy Responses to Coronavirus (COVID-19) http://www.oecd.org/coronavirus/policy-responses/policy-measures-to-avoid-corruption-and-bribery-in-the-covid-19-response-and-recovery-225abff3/.

[39] H. Cassin, FCPA Top Ten, Feb 3 2020, https://fcpablog.com/2020/02/03/airbus-shatters-the-fcpa-top-ten/

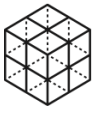


bribes, emanating from western countries, to mainly developing countries, that are ill-equipped to handle the consequences of such dramatic flows. Furthermore, it is important to note that monies paid in settlements, for acts of foreign bribery that undermine governance in the south, end up in the treasuries of governments in the North. The sheer scale of these bribery schemes reveals the extent to which foreign bribery was (is) an integral aspect of the business model of these multinational corporations.

Table 1: Top Ten FCPA Settlements

FCPA settlements	Bribery schemes
Airbus SE *Netherlands/France* **Fine:** $2.09 billion (2020)	**Scheme:** Use of third-party business partners to bribe government officials, executive's decision makers, and other influencers.in China, France, Ghana, Indonesia, Japan, Malaysia, Nepal, Russia, Sri Lanka, and Taiwan
Petróleo Brasileiro S.A. *Petrobras, Brazil* **Fine:** $1.78 billion (2018)	**Scheme:** Facilitated payments to politicians and political parties .in Argentina, Brazil, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, Venezuela.
Telefonaktiebolaget LM *Ericsson, Sweden* **Fine:** $1.06 billion (2019)	**Scheme:** Made and improperly recorded tens of millions of dollars in improper payments in China, Djibouti, Indonesia, Kuwait, Saudi Arabia, Vietnam.
Telia Company AB *Sweden* **Fine:** $1.01 billion (2017)	**Scheme:** Paid bribes to government officials in Uzbekistan. $331 million paid to Uzbek Government Officials
Mobile TeleSystems PJSC *MTS, Russia* **Fine:** $850 million (2019)	**Scheme:** Made at least $420 million in illicit payments for the purpose of obtaining and retaining business in Uzbekistan.
Siemens *Germany* **Fine:** $800 million (2008)	**Scheme:** Paid Bribes and other illicit payments through various means such as, but not limited to, slush funds and using shell companies associated with intermediaries to disguise and launder the funds in Argentina, Bangladesh, China, Iraq, Israel, Mexico, Nigeria, Russia, Venezuela, Vietnam.
VimpelCom *Netherlands* **Fine:** $795 million (2016)	**Scheme:** Funneled bribes to a government official in Uzbekistan and falsified financial records.
Alstom *France* **Fine:** $772 million (2014)	**Scheme:** Paid numerous bribes in countries around the world, including Indonesia, Saudi Arabia, Egypt and the Bahamas
Société Générale S.A. *France* **Fine:** $585 million (2018)	**Scheme:** Société Générale paid bribes through a Libyan "broker" in connection with 14 investments made by Libyan state-owned financial institutions. For each transaction, Société Générale paid the Libyan broker a commission of between one and a half and three percent of the nominal amount of the investments made by the Libyan state institutions. In total, Société Générale paid the Libyan Intermediary over $90 million.
KBR / Halliburton *United States* **Fine:** $579 million (2009)	**Scheme:** Millions of dollars in bribes were paid to agents to use to bribe Nigerian Officials.

The fact that most of these examples represent cases that have taken place in the last 6 years is cause for pause. On the one hand, it is an encouraging sign that the new *US FCPA Style* NTR enforcement is producing results. On the other hand, it is a somber reminder that after decades of anti-corruption programs, research, reforms, studies, and the birth of a whole anti-corruption industry, international corruption, and foreign bribery, may still have the upper hand.



2.1. How does foreign bribery contribute to IFFs?

It is well accepted that there are links between foreign bribery and IFFs.[40] While the ECA IFFs Report states that corruption and bribery directly account for 'just' 5% of IFFs', it also notes that 'the figure could be much higher because corruption *is cross-cutting* and relates to other illicit financial flows components such as organized crime, drug trafficking, money laundering, tax evasion, trade mis-invoicing, lobbying and transfer pricing by private sector businesses…'[41] Bribery is the oil that fuels white collar crime, and makes a 'cross-cutting contribution to IFFs without the officials concerned necessarily exporting their illegally acquired wealth'.[42] Corrupt activities lead to 'leakages of public money[43] and capital flight.[44] It is a 'major constraint for economic development, primarily because corruption brings about a diversion […] of financial resources from the national budget to private spending purposes'.[45]

The Economic Commission for Africa defines IFFs as money illegally earned, transferred or used across an international border.[46] Flowing from this definition, we can surmise that foreign bribery contributes to IFFs because (1) foreign bribery is illegal in itself, (2) involves transferring bribes to foreign officials to abuse and undermine entrusted power and (3) facilitates the expatriation of illicit gains.

2.1.1 Foreign bribery is illegal in itself.

Up until fairly recently, giving bribes to acquire business was not only an accepted business practice, but, in many countries, such bribes constituted a tax deductable that could be declared by corporations. [47] All this changed with the Nixon Watergate scandal and ensuing public outrage. This led the then President Jimmy Carter to pass the 1977 Foreign Corrupt Practices Act (FCPA)[48]. The FCPA for the very first time, criminalised the bribery of foreign officials (otherwise referred to as supply-side bribery). The key elements of the offence of foreign bribery are (1) that the purpose of the bribe is to influence the acquisition of business; (2) the bribe is paid to a foreign official[49], corruptly, or to another person while knowing that the payment will be used to influence a foreign official. US courts have jurisdiction over bribery of officials of other countries by a corporation quoted on a US stock exchange, if it uses the U.S. mails or any means or instrumentality of interstate commerce in furtherance of the corrupt payment. US courts also have FCPA jurisdiction over any US domestic concern, or national, or any other person who engages in an act in furtherance of foreign bribery, while on US territory.

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[40] Goredema, C. (2011), Combating Illicit Financial Flows and Related Corruption in Africa: Towards a More Integrated and More Effective Approach, U4 Anti-Corruption Resource Center, Bergen; Dev Kar and Sarah Freitas, Illicit Financial Flows from Developing Countries 2003-2012,Global Financial Integrity, Washington, DC, (2014) https://gfintegrity.org/report/2014-global-report-illicit-financial-flows-from-developing-countries-2003-2012/ .

[41] ECA IFFs Report (Note 2 above) at p.2

[42] ECA IFFs Report at p.33.

[43] The IMF notes that due to corrupt activities, 'Governments will collect less tax revenues and pay too much for goods and services or for investment projects', A cross-country comparison confirms that government revenues are significantly lower in countries perceived to be more corrupt. See International Monetary Fund (IMF), 2019, Fiscal Monitor, Washington, April at p. 40 and 43.

[44] FATF Laundering the Proceeds of Corruption– July 2011 https://www.fatf-gafi.org/media/fatf/documents/reports/Laundering%20the%20Proceeds%20of%20Corruption.pdf at p.9

[45] 'These private expenses have in general much lower —multiplier effects‖ than expenses on for example education, agricultural fertilizers, health, and infrastructure'. See Yikona, Stuart; Slot, Brigie; Geller, Michael; Hansen, Bjarne; Kadiri, Fatima el. 2011. Ill-gotten money and the economy: experiences from Malawi and Namibia (English). Washington, DC: World Bank. http://documents.worldbank.org/curated/en/564471468288012918/Ill-gotten-money-and-the-economy-experiences-from-Malawi-and-Namibia

[46] ECA IFFs Report, (Note 2 above) at p.15

[47] In response to this practice the OECD passed the Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (1996), urging Member countries that allowed the tax deductibility of bribes to foreign public officials to deny the tax deductibility of such bribes. See 'OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials', (adopted by the Council on 11 April 1996 at its 873rd session [C/M (96)8/PROV]) C (96)27/FINAL.

[48] See Note 7 above.

[49] State-owned business enterprises may, in appropriate circumstances, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials. See U.S. v. Esquenazi, et al., 1:09-cr-21010 (S.D.Fla.2009)

A major problem, when this domestic US law was passed, was that it only applied to American companies. The US started a vigorous international campaign to redress the situation, so that US corporations did not lose market share, by having to engage in business with their hands tied behind their backs, while corporations from other countries faced no such anti-bribery restrictions. The rest is history. The US domestic law has become a global standard.[50] Today, there is a significant array of international rules criminalising supply-side bribery that broadly reflect the standard established by the FCPA as follows:[51] Art 8, of the Inter-American Convention against Corruption;[52] Art 1, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions;[53] Art 3, Convention on the Fight against Corruption involving Officials of the European Communities or Member States of the European Union;[54] Art 2, Council of Europe Criminal Law Convention on Corruption;.[55] Art 8, UN Convention against Transnational Organized Crime;[56] Art 19 (1), African Union Convention on Preventing and Combating Corruption;[57] and Art 16, United Nations Convention against Corruption.[58]

While some of these instruments left the adoption of domestic rules criminalizing bribery of foreign officials to the discretion of the state,[59] the OECD adopted a mandatory approach, and requires signatory parties to make foreign bribery a criminal offence.[60] The 37 member countries of the OECD[61] have since enacted implementing legislation criminalizing foreign bribery.[62] This means that corruption in international business is now a crime in many of the largest economies.[63] It is however important to note that while most Western (supply-side bribery) countries have criminalised foreign bribery, many (demand-side) countries in the south are yet to do so.[64]

2.1.2 The flow of foreign bribery funds to abuse entrusted power.

Corporations pay enormous bribes to gain business opportunities by encouraging elected representatives and elites to abuse their office to grant contracts in their favour. This represents

[50] Makinwa, A.O., Current Developments in the Fight Against Corruption, in Handmaker J. and , K. Arts K', (eds), Mobilizing International law for 'Global Justice', Cambridge University Press pp.119 - 141
[51] Makinwa A.O., 'The Rules Regulating Transnational Bribery: Achieving a Common Standard?' International Business law Journal, 2007(1), pp. 17-39.
[52] Inter-American Convention against Corruption, 29 March 29, 1996, 35 ILM, p. 724, adopted at Caracas, Venezuela, entered into force on 6 March 1997.
[53] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 27 November 1997, in force 15 February 1999, 1998, 37 ILM, p. 1.
[54] Convention drawn up on the basis of Art. K.3(2)(c) Treaty on European Union on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, Official Journal C 195, 25 June 1997, p. 0002-0011, not yet in force. In 2003, this prohibition was extended to private sector bribery with the Council Framework Decision on combating bribery in the private sector. See Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, not yet in force, Official Journal L 192, 31/07/2003 p. 0054-0056.
[55] Criminal Law Convention on Corruption, Strasbourg, 27 January 1999, in force 1 July 2002, 173 CETS; Civil Law Convention on Corruption, Strasbourg, 4 November 1999, in force 1 November 2003,174 CETS.
[56] United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, in force 29 September 2003, 2225 UNTS; (2000), 40 ILM, p. 353.
[57] African Union Convention on Preventing and Combating Corruption, in force 5 August 2006 43 (1) ILM, p.1.
[58] United Nations Convention against Corruption, New York, 31 October 2003, in force 14 December 2005, 2349 UNTS, p. 41; (2005), 43 ILM, p. 37.
[59] The UNCAC, for example requires states to take measures establishing the act of corruption in international business as a criminal offense but makes this subject to the principle of sovereign equality and non-intervention in the domestic affairs of other states.
[60] Art. 1 OECD Convention.
[61] The OECD has 37 member countries works closely with some of the world's largest economies: Brazil, China, India, Indonesia, and South Africa, who are OECD Key Partners. http://www.oecd.org/about/members-and-partners/
[62] See the OECD's website for details on the implementation of OECD Convention at http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm
[63] It is also important to note that several large exporting economies are yet to criminalize foreign bribery as for example China, India, Indonesia, Saudi Arabia .
[64] UNCAC Status of Implementation (Second Edition, 2017) at p. 30 notes: 'In more than one third of States, the vast majority of them from the Group of Asia-Pacific States and the Group of African States, the relevant conduct has not been criminalized or has been criminalized to a very limited extent (for example regarding officials of a particular regional organization), although legislation to this effect was pending in about 12 of these countries.'

a flow of funds to abuse and undermine entrusted power. This shocking revelation was first made public, during the afore-mentioned Watergate Hearings,[65] where the House Committee noted that: '[M]ore than 400 corporations have admitted making questionable or illegal payments. The companies, … have reported paying out well in excess of $300 million in corporate funds to foreign government officials, politicians, and political parties. These corporations have included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries.'[66]

In a similar vein, the OECD in its 2014 Foreign Bribery Report notes that, in the majority of foreign bribery cases, bribes were paid to obtain public procurement contracts (57%), followed by clearance of customs procedures (12%).[67] The report also noted that '[o]n average, bribes equaled 10.9% of the total transaction value and 34.5% of the profits.'[68] These bribes were promised, offered or given most frequently to employees of public enterprises (state-owned or controlled enterprises, SOEs) (27%), followed by customs officials (11%), health officials (7%) and defence officials (6%).[69]

2.1.3 Bribery is implicated in the expatriation of illicit gains

Corporations are also involved in foreign-driven IFFs by helping to hide corrupt proceeds.[70] The Conference of States Parties to the UNCAC has noted that corporate entities use shell companies, trusts and other similar arrangements, to commit or conceal crimes of corruption or to hide, disguise or transfer the proceeds of corruption (profits, benefits, proceeds or advantages of monetary value) to countries that provided safety to the corrupt and/or such proceeds.[71]

3. Systemic problems with prosecuting foreign bribery

Historically, fundamental obstacles to the successful prosecution of foreign bribery, have included,[72] (1) the fact that there was no specific rule to enforce as foreign bribery was, until fairly recently, not a criminal offence; (2) the extensive use of foreign bribery as an established business practice by multinational corporations; (3) the covering up of foreign bribery by 'cooking' the corporations books and records (4) the limitations faced by prosecutors to detect, much less successfully prosecute, acts of foreign bribery and (5) the lack of political will to take actions against corporations and/or officials because the state is a biased actor in the very

[65] These revelations were the trigger for the Foreign Corrupt Practices Act.
[66] Foreign Corrupt Practices Act: House Report. 95-640, 95th Congr. (1977) at p. 4; See also the United States Senate, Securities and Exchange Commission, 'Report on Questionable and Illegal Corporate Payments and Practices', (12 May 1976).
[67] Id.
[68] OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, OECD Publishing, Paris,(2014) www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm. Key Findings at p.8 ; See also OECD, Data on enforcement of the Anti-Bribery Convention, 2018, http://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2019.pdf
[69] Id.
[70] International Monetary Fund (IMF), 2019, Fiscal Monitor, Washington, April at p. 41
[71] Preventing and combating corruption involving vast quantities of assets: Note by the Secretariat, Conference of the States Parties to UNCAC https://www.unodc.org/documents/treaties/UNCAC/COSP/session8/CAC_COSP_2019_13_E.pdf; See also -Halter, Emily Marie; Harrison, Robert Mansour; Park, Ji Won; Sharman, Jason Campbell; Van Der Does De Willebois, Emile J. M.. 2011. The puppet masters : how the corrupt use legal structures to hide stolen assets and what to do about it (English). Stolen Asset Recovery (StAR) initiative. Washington, DC: World Bank. http://documents.worldbank.org/curated/en/784961468152973030/The-puppet-masters-how-the-corrupt-use-legal-structures-to-hide-stolen-assets-and-what-to-do-about-it
[72] The OECD, highlights the following as common concerns, loopholes in the legal framework, lack of investigations, prosecutions, and sanctions of foreign bribery offences, insufficient resources to combat bribery, the need for better systems for uncovering corruption, poor awareness of the law among both companies and officials, and insufficient sanctions against companies bribing foreign officials. See, OECD, Illicit Financial Flows from Developing Countries: Measuring OECD Responses, OECD, IFFs Report (Note 28 above) at p.73

crimes it is supposed to prosecute.[73] Beyond these direct obstacles, there are also are broader questions on the suitability of criminal prosecution to redress the full ramifications of damage caused by bribery. Also open to question is the fact that punishing a corporation has often simply meant that the cost of punishment is paid by innocent bystanders such as employees, shareholder and consumers.

The FCPA has introduced a new method of foreign bribery investigation and prosecution that tackles some of these systemic issues head-on and provides important lessons for any policy discussion about foreign bribery investigation and prosecution, especially from the development, demand-side of bribery perspective.

3.1. Lack of capacity and political will on the demand-side

> *Participant 3: (Tape 2, 00:10:16) When you do not have the control of […] enforcement there is nothing you can do and those who are supposed to enforce, they are already compromised […]. People are compromised, those who are to enforce the law, they are already compromised.*[74]

The FCPA shifted the locus of prosecution away from relatively ill-equipped, demand-side, bribe-recipient countries, to supply-side prosecutors with the capacity and tools to carry out the types of investigations necessary to detect, establish and prosecute corrupt activity. This also shifted the locus of prosecution to countries that, in general, have better governance structures, more sophisticated justice systems and better equipped, more independent agencies. The shift of locus resolves a central weakness of the fight against corruption, namely the gap between the lack of strategic capacity in institutions and agencies of many bribery demand-side countries, and, the deep-pockets and business practices of supply-side multinational corporations. Corporations were now put on the defensive. Suddenly, to use the words of the famous OECD report, it was 'no longer business as usual'.[75]

By bringing the *corrupt transactions occurring in developing countries* within the jurisdictional reach of US courts, the regulatory gaps and domestic demand-side politics that had hitherto shielded foreign bribery was stripped away. With the passage of the FCPA, corporations were now faced with a *new* consideration. Giving a bribe to gain a foreign business contract, could now be outweighed by a punitive response from a governing regulatory framework that made the choice to bribe a foreign official carry more risk. Businesses do not exist in a vacuum but are responsive to their environment. The history of FCPA implementation shows that this change in the regulatory framework has been a positive influence in tilting the scale in favour of compliance.

However, enforcement in demand-side countries remains far off from gaining similar traction. In 2018, the OECD published a report on the demand-side of foreign bribery by focusing on what happened on the receiving end of a foreign bribery transaction and whether the public officials in the demand-side country were also sanctioned or otherwise disciplined. The study revealed that public officials accepting bribes from companies based in countries that are party to the OECD Anti-Bribery Convention run little risk of being punished.[76]

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[73] See generally, World Bank (2009), Politically Exposed Persons: A Policy Paper on Strengthening Preventive Measures, World Bank, Washington, DC; StAR (2011), Barriers to Asset Recovery. An Analysis of the Key Barriers and Recommendations for Action, The World Bank, Washington, DC.
[74] A. Makinwa, Private Remedies for Corruption: Towards an International Framework, Eleven, International Publishing, 2013, p.46.
[75] OECD (2000), No Longer Business as Usual: Fighting Bribery and Corruption, OECD Publishing, Paris, https://doi.org/10.1787/9789264187788-en.
[76] OECD (2018), Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End? www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm. Section 5.2 of this paper suggests how this enforcement gap can be bridged by developing demand-side bribery NTRs.

3.2. Lack of political will on the supply-side

The monopoly on initiating sanction held by the state can lead to a conflict of interest where the state does not have the political will to commence a criminal prosecution against its domestic companies.

With the global emergence of FCPA-inspired rules, other countries, in a similar fashion to the United States, have adopted extraterritorial jurisdiction over bribes paid in other countries. Such extraterritorial jurisdiction makes it possible for *any other country* that has a jurisdictional link to the foreign bribery transaction to assume jurisdiction. Thus, even where political currents in the home country lead to a lack of investigation or prosecutions, another country with a jurisdictional link can proceed with investigations. This increases the risk of prosecution and is one more incentive for compliance.

An illustrative example is provided by France. In 2000, France adopted Article 435-3 of its Penal Code, which criminalized foreign bribery. However, the OECD Working Group on Bribery in reviewing the enforcement of this law, noted that France, despite the size of its economy and the exposure of French companies to the risk of foreign bribery, had not had a single conviction of overseas 'classic bribery' under this comprehensive anti-bribery legislation. [77] This was all the more remarkable because French companies Total, Alstom, Alcatel and Technip had entered into deferred prosecution agreements and/or entered guilty pleas with the US authorities, in this same period.[78] Thanks to the delocalization of foreign bribery prosecution, the United States had no problems investigating and charging these companies. Another example is found in the BAE-Systems case, where after Tony Blair halted the British efforts to investigate deals made with Saudi Arabia[79], the company pleaded guilty to bribery charges in the United States and to pay a $400 Million Criminal fine.[80]

3.3. Information asymmetry

A World Bank study of 150 grand corruption cases showed that all used corporate vehicles to hide ownership, and separated the origin of the funds from the real beneficial owners using easily dissolvable , multi-layered chains or interjurisdictional structures, by using specialized intermediaries, professionals or nominees to conceal true ownership; [81] This also creates difficulty in ascertaining, where in the chain of control, guilt can be attributed and this may lead to a lack of prosecution.[82]

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[77] France Follow-up to the Phase 3 Report and Recommendations, OECD, (2014) http://www.oecd.org/daf/anti-bribery/France-Phase-3-Written-Follow-up-ENG.pdf .
https://www.debevoise.com/~/media/files/insights/publications/2016/05/fcpa_update_may_2016.pdf

[78] See Debevoise & Plimpton, FCPA Update May 2016, Vol 7, No. 10 at p.8-9
https://www.debevoise.com/~/media/files/insights/publications/2016/05/fcpa_update_may_2016.pdf

[79]UK Attorney General Lord Goldsmith on the dropping of the BAE Bribe Probe stated, 'If you are faced with the reality of the situation that there's going to be massive damage - not to jobs - but to national security, our counter-terrorism capabilities, vital interests and against that you have the prospect of a case which is going to go nowhere, then I think the answer is you have to be realistic and bite the bullet.' BBC news, 'Blair pressed on BAE probe', Tuesday, 19th December 2006, http://news.bbc.co.uk/2/hi/uk_news/politics/6193703.stm..

[80] US DOJ, Press Release, 1 March 2010, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine, https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine .

[81] Van der Does de Willebois, E. et al. (StAR, Stolen Asset Recovery Initiative 2011), Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It, StAR and the World Bank, Washington, DC. reported in OECD, Illicit Financial Flows from Developing Countries: Measuring OECD Responses, OECD, 2014, https://www.oecd.org/corruption/Illicit_Financial_Flows_from_Developing_Countries.pdf at p.38.

[82] Recent illustrative examples are the dropping of the Rolls Royce investigation in the UK (after a DPA had been entered into) on the grounds that there was 'either insufficient evidence to provide a realistic prospect of conviction or it is not in the public interest to bring a prosecution in these cases'. SFO Press release, 22 Feb 2019, SFO closes GlaxoSmithKline investigation and investigation into Rolls-Royce individuals, https://www.sfo.gov.uk/2019/02/22/sfo-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/ ; and the ING case in the Netherlands where the after a settlement was reached for money laundering charges, the Prosecutor saw no grounds for prosecuting individual ING bankers for non-compliance with the money laundering

Very few countries have the critical capacity to uncover and ultimately discharge, the traditional burden of proof of beyond reasonable doubt, in respect of foreign bribery activities that are shrouded in secrecy and concealed with the best expertise money can buy. The limitations faced by state prosecuting authorities, even in the most advanced countries, to meet the criminal burden of proof, without help 'from the inside' are formidable. This information asymmetry can cause the criminal justice system, to rather paradoxically, strengthen the walls of impunity by the lack of successful prosecutions. Furthermore, trials are expensive, and decisions are subject to appeal. All this adds up to a costly, public-skepticism-inducing, inefficient investigations and prosecution processes for foreign bribery.[83]

As can be imagined, this problem is even more profound in demand-side countries. The FCPA solves this problem of information asymmetry by putting in place mechanisms to 'uncover' the 'covering up' of bribery. Firstly, through the use of the FCPA Books and records provisions,[84] and secondly, through the use of non-trial resolutions such as the central strategy in foreign bribery prosecutions.

The life of a corporation is in its books and records. Cooking the books to disguise payments of foreign bribes used to be a routine activity of foreign corporations.[85] For this reason there are two broad planks to the anti-foreign bribery enforcement strategy of the FCPA. The first is, as above described, criminalizing the supply-side of bribery, and the second plank is the institution of a process to *detect* and *control* the giving of bribes by establishing requirements for books *and records*, as well as internal and accounting controls, that give reasonable assurance that financial reports are accurate.

Second, is the introduction of NTRs. In the United States, prosecutors traditionally enjoy broad discretion on whether to file charges, against whom, what charges to file, whether to drop charges, whether to negotiate a plea or other resolutions.[86] This provides the catalyst for NTRs, whose essential characteristic is leniency contingent on co-operation. Corporations self-report and voluntarily provide information and evidence of channels of corruption that the prosecutors would not have discovered on their own. This gives insight into the flow of bribes from the supply-side corporation to the demand-side public officials, the identities of key actors and well as the modus of transfer. The better the evidence, the more extensive the cooperation, the greater the chance for an NTR.

3.4. Avoiding corporate death and collateral consequences

NTRs may better avoid the perverse reality that corporate punishment may injure *innocent bystanders* such as company employees, shareholders and consumers rather than the artificial

rules. See, Ministerie van Financiën (2018), Brief inzake "Strafrechtelijk onderzoek ING" van de ministers Hoekstra en Dekker aan de Tweede Kamer, 11 september 2018. https://www.om.nl/publish/pages/58352/feitenrelaas_houston.pdf.

[83] A recent striking example of the limited resources versus deep pockets in the recent ruling against the UK National Crime Agency (NCA), whose appeal against the discharge of an unexplained wealth order linked to a family member of the Former Kazakh President, Nursaltan Nazarbaye was dismissed. Crucially,the NCA has been ordered to pay costs in the sum of £1.5million which by some estimations means that the NCA has 'spent 10 years of its predicted UWO costs on a single case, excluding its own costs'. See J. Sinclair, The NCA's Kazakh Unexplained Wealth Order (UWO) – a costly decision?, 1 July 2020, https://www.spotlightcorruption.org/the-ncas-kazakh-unexplained-wealth-order-uwo-a-costly-decision/

[84] 15 USC Sec. 78m.

[85] See the following comment of the Senate Committee on Banking, Housing and Urban Affairs:
'In the past, corporate bribery has been concealed by the falsification of corporate books and records. Title I removes this avenue of cover-up, reinforcing the criminal sanctions which are intended to serve as the significant deterrent to corporate bribery. Taken together, the accounting requirements and criminal prohibitions of Title I should effectively deter corporate bribery of foreign government officials.' See US. Senate, Committee on Banking, Housing and Urban Affairs: Foreign Corrupt Practices and Domestic Foreign Investment Improved Disclosure Act of 1977, Foreign Corrupt Practices Act, Senate Report, No. 95-114, 1977, at p. 3.

[86] See Andrew Levine, Country Report United States, in Abiola Makinwa and Tina Søreide, Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences (The International Bar Association (IBA), Anti-Corruption Committee, Structured Criminal Settlements Sub-Committee 2018). (Hereinafter IBA Survey.) http://www.oecd.org/corruption/anti-bribery/IBA-Structured-Settlements-Report-2018.pdf at pp. 404-410.,

corporation that has 'no soul to be damned, and no body to be kicked'. Ultimately it is not the corporation that gets punished. Economic disruption can be occasioned by criminal prosecution. A classic example is the Arthur Andersen conviction, where punishment resulted in a collapse that impacted innocent third parties, employees, supply chain actors, and ultimately the economy.[87]

Furthermore, as regarding corporations, the criminal justice goals of retribution, deterrence and rehabilitation must achieve this purpose while at the same time not killing the 'economic goose' that lays the 'golden eggs' of our modern way of life.[88] This is particularly true of developing economies. We *do* need a robust private sector to grow the economy for the benefit of all. Therefore, a balance has to be struck in reaching the goals of corporate criminal justice, while avoiding the devastating consequences of *corporate death*, which can undermine political, social and economic growth. *US Style NTR* regimes arguably encourage corporations to become more ethical, better organised and efficient, while at the same time encouraging corruption prevention. By by so doing, NTRs are better able to square the coporate crime punishment conundrum.[89]

3.5. With corruption 'prevention is better than cure'

A much more problematic issue of anti-corruption enforcement using the criminal trial process, is its appropriateness as the main strategy to punish damage caused by foreign bribery. The focus of criminal prosecution is to find, prosecute, and punish the bribe-giver or the bribe-taker. This enforcement strategy does not address the underlying corrupt transactions,[90] nor the full ramifications of foreign bribe-giving. As Susan Rose Akerman points out, the most severe costs of corruption are often not the bribes themselves, but the underlying distortions they reveal. They are a symptom of disease, not the disease itself.[91] Traditional criminal prosecution does not capture the 'true costs' of bribery.

A good illustration, given by the OECD, is the observation that a USD 1 million-dollar bribe can quickly amount to a USD 100 million-dollar loss to a poor country through derailed projects and inappropriate investment decisions which undermine development.[92] While the criminal justice system will typically focus on a punishment structured around the USD 1 million-dollar bribe, the USD 100 million-dollar loss to the poor country, wreaks far greater havoc. This bribe fuels the abuse of entrusted power, which, in turn, leads to an abuse of the rule of law. Government agencies charged with providing political stability and economic security are compromised. This, in turn, leads to gaps in governance that cause social, economic, and political losses that are especially harsh on women and other vulnerable segments of society. The breakdown of governance, in turn, fuels more corruption and the cycle continues. The public/private cooperation character of NTRs encourages *corruption prevention* that can break this vicious corruption cycle.

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[87] Kathleen F. Brickey, Andersen's Fall from Grace, 81 WASH. U. L.Q. 917, 929– 34 (2004). However, see Markoff who seeks to dispel the Anderson effect as a myth. (he argue that Criminal Indictments have not led to corporate collapse and (2) corporate convictions can also lead to imposition of compliance programs in the same way as DPA's ergo we should have more corporate convictions

[88] Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations, Belknap Press (2014).

[89] See Section 4 below.

[90] Makinwa A.O. 'A Transaction Approach to Fighting International Corruption.' in J. Blad, M .Hildebrandt, K. Rozemond, M. Schuilenburg & P. Van Calster (eds), Governing Security under the Rule of Law? Eleven International Publishing, 2010, at pp. 175 – 194.

[91] Rose-Ackerman, Susan. 1996. The Political Economy of Corruption : Causes and Consequences. World Bank, Washington, DC. © World Bank. https://openknowledge.worldbank.org/handle/10986/11629 License: CC BY 3.0 IGO

[92] OECD IFFs Report (Note 32 above)p.73. See also Matthew Stephenson, The Amount of Bribery and the Cost of Bribery are not the Same, The Global Anticorruption Blog, 2015, https://globalanticorruptionblog.com/2015/12/15/the-amount-of-bribery-and-the-cost-of-bribery-are-not-the-same/ .

Also not considered in a traditional criminal prosecution, are the 'victims' that bear the brunt of the political, social and economic lack of development that results from foreign-bribery and IFFs. Traditional criminal prosecution also fails to sufficiently address the consequences of successful acts of bribery. Bribery is a means to an end and not an end in itself. If the foreign bribe transaction is successful, it will result in another contract, i.e., the contract for the business that the bribe was proffered to obtain.[93] These foreign bribery induced contracts are then taken out of the reach of domestic courts overview because they are usually of an international character and will often fall under confidential systems of international commercial arbitration and outside the jurisdiction of national courts.[94] The NTR focus on prevention before occurrence better addresses this undesirable 'rewarding of bad behaviour'.

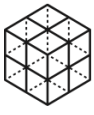
A failure to fully address these broader consequences leads to an erosion of governance. Indeed, where corruption has taken root, the traditional focus of *deterrence* through punishment *after* the corrupt act has taken place, may contribute to impunity and a failure to punish or deter altogether. In developing countries, this failure can constitute a license for impunity, undermine governance, and, perpetuate a lack of capacity.

4. The development-friendly incentive structure of NTRs.

Why would a company self-report? What is the incentive for a corporation to enter in an NTR? NTRs bring the stakeholders involved in, or affected by, corrupt activity (with the glaring exception of the ultimate victims of the foreign bribery and demand-side bribe takers)[95] to the negotiating table by *exploiting common shared interests*.[96] In this framework, the incentive for compliance is not contingent upon successfully prosecuting and punishing acts of foreign bribery, but, rather, on the persuasiveness of evidence put forward of the extent to which a corporation sought to *prevent corruption*. With such an incentive structure, even where a corporation is operating in an environment where corruption is endemic, or where governance is compromised and the chances of being caught, or successfully prosecuted are nil, the incentive for compliance remains intact. NTRs create a 'SMART' opportunity for foreign bribery or investigation and prosecution where, even *before* any discovery of corrupt activity, or any investigation or prosecution has occurred, the corporation has, in its own interest, taken systemic steps to prevent corruption.[97]

The United Nations supports such an approach to fighting corruption. Article 39 UNCAC specifically calls on states to encourage cooperation between private sector entities and national investigating and prosecuting authorities to resolve corruption offences. State parties are also urged to take measures to encourage persons who have participated in the commission of a bribery offence to supply useful information for investigation and evidentiary purposes, or to contribute to depriving offenders of the proceeds bribery or recover such proceeds.[98] States are encouraged to enhance accounting and auditing standards by promoting co-operation

[93] See A. Makinwa, Private Remedies for Corruption: Towards an International Framework, Eleven, International Publishing, 2013, pp.11 -13 and 331-363.
[94] Id pp. 299- 328.
[95] See Section 6 below for how this can be addressed.
[96] See Section 6 below for a discussion of this gap in the NTR framework.
[97] A. Makinwa, Negotiated Settlements for Corruption Offences, Wither Europe, in A. Makinwa (eds) Negotiation Settlements for Corruption Offences, A European Perspective, Eleven International Publishing, (2015) p. 6.
[98] Article 37 UNCAC.



between law enforcement agencies and relevant private entities.[99] The convention outlines measures such as mitigation of punishment[100], granting of immunity[101] and cooperation in multi-jurisdictional cases[102] as steps that can be taken to encourage cooperation. Such public/private cooperation holds advantages for the state and also for the alleged wrongdoing corporation.

4.1. How do NTRs encourage corruption prevention?

A singular achievement of the *US Style NTR* has been the effect it has had on the operation and internal culture of corporations. *Corruption prevention* is now a central aspect of the risk mitigating strategies that are now obligatory for most corporations (at least for those that do not want to face the wrath of their shareholders when faced with a looming foreign bribery investigation and an executive that has not reduced bribery risk exposure by putting in place an effective compliance program). This, from a development perspective, is truly remarkable.

Below we take a look at how charging policies in NTR regimes can encourage corruption prevention. Looking at the United States.[103] England[104] and France[105] we observe the corporate behaviour that is required to be quantifiably demonstrated, so as to positively influence a prosecutor's decision on whether or not to reward a corporate wrongdoer with an NTR process, or whether to proceed to a full trial. These requirements stipulate self-policing, self-reporting and cooperation. This requirement addresses the information asymmetries faced in traditional criminal prosecution. We also see a similar pattern in Brazil,[106] as an example of a country without corporate criminal liability where NTRs occur in the administrative sphere. Cooperation relates to the quality and sufficiency of the evidence that is proffered voluntarily by the company in respect to the act of foreign bribery in question. Also common to these regimes is the requirement that top executives are involved and accountable. There can no longer be any burying head in the sand 'ostrich' behaviour. The claim that foreign bribery was the action of a 'rogue employee 'is no longer be acceptable. Corruption is systemic and the buck stops in the 'C Suite'. Also, important to note in this regard, are the growing requirements for evidence to ensure that individuals are also held accountable for the acts of foreign bribery.[107]

Common to the different regimes considered is the requirement for a risk-based approach to identifying the particular bribery risks that the corporation is exposed to. Bribery risk mapping, identification, management and review must be an integral part of the corporation's anti-

[99] Article 12(2)(a) UN General Assembly, United Nations Convention against Corruption (UNCAC): Resolution adopted by the General Assembly, 21 November 2003, A/RES/58/4, U.N.T.S 2349 October 2003, 41 (entered into force, December 14, 2005). Hereinafter UNCAC.
[100] Article 37(2) UNCAC.
[101] Article 37(3) UNCAC.
[102] Article 37(5) UNCAC.
[103] -Justice Manual, Title 9, Criminal, 9-47.120 2019 FCPA Corporate Enforcement Policy. https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.110 ; U.S. Department of Justice Criminal Division Evaluation of Corporate Compliance Programs (Updated June 2020) https://www.justice.gov/criminal-fraud/page/file/937501/download .
[104] Deferred Prosecution Agreements Code of Practice for Prosecutors was published jointly by the SFO and CPS: https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ Bribery Act 2010 Guidance , https://www.gov.uk/government/publications/bribery-act-2010-guidance .
[105]PNF and French Anti-Corruption Agency Joint Guidelines on the Implementation of the Convention Judiciare D'interet Public (Judicial Public Interest Agreement) (June 27, 2019) https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf ;French Anti-Corruption Agency guidelines, 2017, https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/French_Anticorruption_Agency_Guidelines.pdf
[106] Guidelines to the leniency agreements by the Brazilian Prosecution Service (MPF): http://www.mpf.mp.br/atuacao-tematica/ccr5/publicacoes/guia-pratico-acordo-leniencia/ ;The Anti-Corruption Act: http://www.mpf.mp.br/atuacao-tematica/sci/normas-e-legislacao/legislacao/legislacao-em-ingles/law-n-12-846-civiland-administrative-liability-of-legal-persons ;Guidelines for Private Companies: https://www.gov.br/cgu/pt-br/centrais-de-conteudo/publicacoes/integridade/arquivos/programa-de-integridade-diretrizes-para-empresas-privadas.pdf
[107] In the US see the Yates Memo (2015) Individual Accountability for Corporate Wrongdoing, https://www.justice.gov/archives/dag/file/769036/download.

foreign bribery strategy to have any influence on an NTR. There must also be evidence of the policing of interactions with third parties by way of effective third-party due diligence procedures. All these steps must be properly communicated to corporate employees and associated persons as demonstrated by the adequacy of training programs.

Timely action, remediation, as well as, periodic testing and review of further factors that influence the prosecutor's decision. These requirements mean that corporations must imbed effective internal controls and information management systems to detect and act upon (remediate) ascertained bribery risks or discoveries of acts of bribery. This fundamentally changes the way corporations are run, and, has led to the world-wide introduction of compliance departments and compliance officers, and more recently, ethics officers in corporations.

Very important to shaping corporate behaviour towards corruption prevention, are the guidelines that explain to corporations what factors would incline the prosecutor towards an NTR. NTR regimes may be *explicit* about this interaction between the alleged wrongdoer and the prosecuting authority or *non-explicit*.[108] An *explici*t model exists where the framework for an NTR includes (a) clear guidance on what constitutes the relevant factors that will be considered by prosecuting authorities in arriving at a settlement; and (b) there is some indication of the extent to which self-reporting and co-operation by a corporation will be rewarded. An NTR regime that does not provide these clear indicators can be described as *non-explicit or opaque*.

The examples of the US, England and Wales, France and Brazil are explicit NTR frameworks.[109] They provide a measure of transparency and consistency by explaining the full range of potential mitigation behaviours available to companies. The more explicit the guidance, the more likely that it can be used as a guide by corporations seeking to adapt their behaviour in such a way as to mitigate or avoid culpability. In this regard, explicit NTR frameworks provide a greater measure of incentive for corporations to put into place hard and soft controls to prevent acts of corruption from occurring. Non-explicit NTR regimes are not recommended as they provide little guidance around which corporations can take preventive measures.

Also, important to observe in the exercise of prosecutorial decision is the requirement for an effective compliance program *at the time of the offence*. This means that the requirements relating to the Compliance program must have been in place *prior* to the alleged act of foreign bribery so as to influence the possibility of obtaining an NTR, or reduction in monetary penalty or other compliance obligations such as monitoring or reporting obligations.

The sum total of this approach is a shift towards *corruption prevention* as the principal strategy of anti-corruption enforcement. This is far reaching because these requirements are structurally integrated into the way a company does business. NTRs encourage powerful economic entities (with their vast budgets) to develop and implement anti-corruption mechanisms. Properly done, this can have a positive effect on the development agenda. Table 1 is a comparative overview of factors influencing the prosecutorial decision on whether or not to enter into an NTR, as well as, the factors that show eligibility of an alleged wrongdoing corporation for an NTR.

[108] Makinwa A.O., Public/Private co-operation in anti-bribery enforcement: non trial resolutions as a solution? In Tina Soreide, Abiola Makinwa, (eds) Negotiated Settlement in Bribery Cases: A Principled Approach, Elgar, 2020, pp. 42 – 67 at 55.
[109] See definition of NTRs adopted in this paper, Note 8 above.

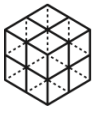


Table 1: Overview of factors influencing the prosecutorial decision and choice of NTR

<table>
<tr><td>United States</td><td>England</td><td>France</td><td>Brazil</td></tr>
<tr><td colspan="3">Factors influencing Prosecutorial Decision for NTR or Trial</td><td>(administrative)</td></tr>
<tr><td>• Voluntary disclosure
• Full cooperation
• Timely and appropriate remediation
• Top executives' involvement
• Significant profit from bribery
• Pervasiveness of misconduct
• Recidivism</td><td>• Cooperation
• Reporting
• Remediation
• Recidivism</td><td>• Self-reporting
• Cooperation
• Approach to privilege
• Sufficiency of evidence
• Recidivism
• Compliance Program</td><td>• Sufficiency of Evidence
• Admission of wrongdoing
• Demonstrable cessation of corrupt activity
• Full and permanent cooperation
• Restitution of damage
• Corrective measures</td></tr>
<tr><td colspan="4">FACTORS SHOWING ELIGIBILITY FOR NTR (Corruption prevention)</td></tr>
<tr><td>Is compliance program well designed?</td><td>Compliance program</td><td>Compliance program</td><td>Compliance program</td></tr>
<tr><td>• Risk assessment
• Policies and procedures
• Training and communications
• Confidential reporting structure and investigation process
• Third party management
• Mergers and acquisitions due diligence</td><td rowspan="4">• Procedures proportionate to corporation's bribery risks
• Top level commitment to prevent bribery by associated persons and culture that bribery is never acceptable
• Periodic, informed and documented of bribery risk assessment
• Anti-bribery due diligence of persons who perform on behalf of the corporation
• Anti-bribery prevention policies and procedures are embedded and understood throughout the organisation using communication and training
• Monitoring and review procedures designed to prevent bribery by persons associated with it and makes improvements where necessary</td><td rowspan="4">• Top management commitment to zero-tolerance bribery policy.
• Anti-corruption code of conduct
• Internal whistleblowing system
• Risk mapping to deepen their knowledge and strengthen control of corruption risks.
• Third-Party due diligence procedures based on findings of corruption risk map.
• Accounting Control Procedures to Prevent and Detect Corruption.
• Corruption risk training throughout an organisation's workforce.
• Internal monitoring and assessment system to make sure corruption prevention and detection measures – informed by its corruption risk mapping – are appropriate and effective</td><td rowspan="4">• Top level commitment to zero tolerance bribery policy
• Risk assessment to research analyze and address potential risks
• Compliance policies applicable to all employees and third parties
• Due diligence to periodically assess third parties
• Internal monitoring, testing and review to find and fix gaps.
• Transparency of books and records
• Reporting and disciplinary measures.
• Channels of communication
• Protection of whistle-blowers
• Training of all stakeholders</td></tr>
<tr><td>Is compliance program well resourced?</td></tr>
<tr><td>• Top level commitment
• Autonomy and resources
• Incentives and disciplinary measures</td></tr>
<tr><td>Does compliance program work in practice?</td></tr>
<tr><td>• Continuous improvement, periodic testing and review.
• Investigation of misconduct
• Analysis and remediation</td></tr>
<tr><td></td><td>Victims Compensation</td><td>Victims Compensation</td><td></td></tr>
</table>

4.2. Win-win: Advantages of NTRs for the State and for the corporation

The advantages of NTRs for the State can be summarized as follows:

1. They shift the focus of anti-foreign bribery enforcement from corruption punishment to corruption prevention.
2. By encouraging corruption prevention, NTRs can help to mitigate some of the broader ramifications of the political, social, and economic costs of corruption.
3. Helps the state to use the influence that the corporation has over parties within its sphere of influence, such as agents, employees, customers or any other third parties to foster corruption prevention.
4. Overcome information and power asymmetries, by putting the onus of the corporation to volunteer usable evidence about the foreign bribery act in question. This can lead to the uncovering of 'channels of corruption' that can then be broken up.
5. Encourages corporations to implement effective whistle-blower schemes as part of required compliance programs.
6. Reduces the length of time and costs of investigations. The traditional criminal process is typically slow and costly, judgments are subject to appeal, making the path of a full trial a lengthy, unpredictable and expensive process.
7. Mitigates the challenge of uncovering, investigating and prosecuting complex, multi-jurisdictional, foreign bribery crimes by creating the incentive and mechanism for companies to self-police, self-report and engage in pro-active corruption prevention focused compliance programs.
8. NTRs provides a greater social dividend. It makes a business case for compliance that provides a rational reason for foreign corporations to resist giving bribes to foreign officials and elites.

Thus, preventing the further erosion of the rule law and governance. NTRs also provide a mechanism for the states to encourage changes in corporate behaviour that foster corruption prevention rather than being complicit in encouraging impunity by a reluctance to investigate and prosecute domestic corporations for foreign bribery.

The advantages of NTRs for the corporation can be summarized as follows.

1. NTR regimes create a negotiating advantage for corporations who take steps to curb corruption, thus placing them in a better position to negotiate with the authorities if violations, despite best efforts, do occur.
2. Removes exposure to the unpredictability of domestic courts; reduces costs both in terms of the duration of the process, possibility of reduced penalties and reputational damage; Has better optics from a reputational point of view; The somewhat private nature of the settlement process as opposed to public nature of court proceedings is also a preferred option for many corporations.
3. Increases internal efficiencies of corporations who take steps to curb corruption by instituting a compliance program, internal controls and other compliance processes. Introduces new efficiencies in business relations, in particular when third-party due-diligence measures are being carried out by its co-contractors.
4. Helps the compliance officer to make the business case for compliance and supports the development of integrity and an ethical corporate culture.
5. Can facilitate coordination among Anti-Corruption Authorities and allow for parallel resolutions or global agreements if the corporation is the subject of simultaneous prosecutions by several authorities.

6. Does not require an admission of guilt and therefore does not raise the risk of debarment from public contracting because the case is resolved before a charge is entered into.

5. Assessing NTRs: One size does not fit all

'…when prosecutors choose not to prosecute to the full extent of the law in … case[s] as egregious as this, the law itself is diminished. The deterrence that comes from the threat of criminal prosecution is weakened, if not lost'[110]
-New York Times

It is useful to consider some of the commonly encountered criticisms of this new mode of foreign bribery enforcement. In this respect, it is important not to adopt a 'one size fits all' approach. Conclusions reached in one political and development context may not be relevant with regard to another socio-economic context. There are two contrasting viewpoints on the rule of law implications of NTRs. For commentators in countries that have mature democracies, stable economies, and more sophisticated law enforcement, the rule of law discourse is mainly centered on deterrence through effective criminal punishment. In this view, NTRs, that avoid the criminal trial, are seen as an abuse of the rule of law.

However, in development side countries where compromised institutions of governance may reduce a society to a fragile state[111], mechanisms that bypass these corruption-vulnerable institutions may be of more relevance. Furthermore, when the broader ramifications of the effects of foreign bribery are considered, NTRs, by encouraging corruption prevention can break the vicious cycle of corruption and usher in the rule of law. A central argument in this paper is therefore that NTRs, by encouraging corruption *prevention ex ante* is a more reliable method of promoting 'integrity, accountability and proper management of public affairs and public property,'[112] than enforcement regimes where corruption is tackled by punishment *ex-post,* after, as it were, the 'cat has been let out of the bag'.

5.1. NTRs and the rule of law: two viewpoints.

If you can negotiate your way out of the application of the full force of the law, can negotiated settlements be consistent with the rule of law? [113] As noted by the New Yorker newspaper, '…when prosecutors choose not to prosecute to the full extent of the law in a case as egregious as this, the law itself is diminished. The deterrence that comes from the threat of criminal prosecution is weakened, if not lost'.[114] Some argue that use of NTRs is a 'failed experiment that erodes the rule of law'.[115] Indeed as pointed out by the US Court of Appeals for the District of

[110] Opinion New York Times, Too Big to Indict, Dec. 11, 2012,
[111] See generally, the Corruption in Fragile States Blog, https://sites.tufts.edu/ihs/category/blog/corruption-in-fragile-states-series/.
[112] Art 1(c) UNCAC
[113] See the viewpoints of Mark Pieth, Negotiating settlements in a broader Law enforcement context; Brandon Garret, The Path of FCPA Settlements; Jennifer Arlen, The potential promise and perils of introducing Deferred Prosecution Agreements outside of the US; Kevin Davis, What Counts as a good Settlement; Tina Soreide and Kasper Vagle, Prosecutors Discretionary authority in efficient law enforcement system, and Susan Hawley, Colin King and Nicholas Lord, Justice for Whom? The Need for a Principled Approach to Deferred Prosecution Agreement in England And Wales, in Tina Soreide, Abiola Makinwa, (eds) Negotiated Settlement in Bribery Cases: A Principled Approach, Elgar, 2020.
114 Opinion New York Times, Too Big to Indict, Dec. 11, 2012, on the decision of Federal and state authorities not to indict HSBC, the London-based bank, on charges of vast and prolonged money laundering, for fear that criminal prosecution would topple the bank and, in the process, endanger the financial system. http://www.nytimes.com/2012/12/12/opinion/hsbc-too-big-to-indict.html
[115] Reilly, Peter R., Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecutions (September 25, 2014). Brigham Young University Law Review, 2015; (he argues that deferred prosecution Agreements serve as a disturbing wellspring of unfairness, double standards and potential abuse of power and states it is time to end this failed experiment in alternative dispute resolution or rename then more accurately as "Avoiding Prosecution Agreements'

Columbia Circuit in Fokker Services BV litigation, '… the entire object of a DPA [NTR] is to enable the defendant to avoid criminal conviction and sentence by demonstrating good conduct and compliance with the law.'[116]

Arlen, therefore argues that NTR regimes are incompatible with the rule of law.[117] Her central claim is that, at its core, the rule of law requires that limitations on the legal rights of individuals must be determined by laws, rather than by potentially arbitrary and unconstrained decisions of individuals and government actors.[118] In a similar vein, Epstein remarks that NTRs turns the prosecutor into judge and jury.[119] Also, of great concern is the fear that the due process protections, fundamental to our criminal justice systems, is being undermined by NTRs. The trial, where the public sees the rule of law in action, is starting to disappear, endangering human rights protection and the rule of law by 'sidestepping procedural safeguards, […] risking coercion, and […] reducing public scrutiny of police and prosecutorial practices and rights violations.'.[120]

For this reason, Uhlmann argues that NTRs 'erode the progress made on holding corporations liable and also erodes the rule of law'.[121] Judge Rakoff considers the argument for NTRs as unpersuasive and observes that government has shifted its focus from policing individuals to policing corporations with little result as there are now less indictments of both individuals and corporations and furthermore that the compliance measures introduced in this process are ineffective 'window-dressing'.[122] Do NTRs deter?[123] Markoff concludes that, 'in spite of the great volume of commentary on the matter, there is little to no empirical proof that DPAs are effective at deterring or otherwise preventing corporate crime, …. the question of whether DPAs "work" has not been answered.' [124]

There is certainly great merit to these criticisms, especially if one transposes the NTR process onto the traditional criminal prosecution where the underlying motivation is to establish guilt and punish the wrongdoer with sufficient severity to satisfy the public need for 'revenge' as well as act as a deterrent. However, with corruption enforcement, perfect is often the enemy of good. Only in the *actual effective enforcement* of anti-foreign bribery rules is the rule of law upheld. While we can now boast of a global framework of anti-foreign bribery laws, the problem is and remains one of enforcement.

APA's. He concludes that individuals and companies avoid prosecution and the rest of America pays a certain and costly price for that avoidance.' At pp. 150

[116] US v. Fokker Services B.V. 818 F.3d 733 (D.C. Cir. 2016)
https://www.cadc.uscourts.gov/internet/opinions.nsf/E7CE07715B86640185257F8C00512106/$file/15-3016-1607222.pdf P. 19

[117] Jennifer Arlen, Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements, 8 J. Legal Analysis 191, 1 Journal of Legal Analysis, Vol 8 No.1(2016) p.193.

[118] Id.

[119] Richard A. Epstein, The Deferred Prosecution Racket, Wall Street Journal, Nov. 28, 2006

[120] The NGO Fair Trials in a recent study notes that, 'the use of trial waiver systems like plea bargaining, abbreviated trials and cooperating witness procedures have increased about 300% since 1990. It's also happening in more places than ever before. Of the 90 countries studied by Fair Trials and Freshfields, 66 now have these kinds of formal "trial waiver" systems in place. In 1990, the number was just 19.' Fair Trials, The Disappearing Trial: Towards a rights-based approach to trial waiver systems (Fair Trials, 2017). https://www.fairtrials.org/sites/default/files/publication_pdf/Report-The-Disappearing-Trial.pdf at p.5

[121] Uhlmann, David M., Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability (October 1, 2013). Maryland Law Review, Vol. 72, No. 4, 2013; (he argues that deferred prosecution and non-prosecution agreements limit the punitive and deterrent value of the governments law enforcement efforts and extinguish the societal condemnation that should accompany criminal prosecution.at p. 1302.

[122] Jed S. Rakoff, The Financial Crisis: Why Have No High-Level Executives Been Prosecuted? New York Review of Books, January 9, 2014. He argues that the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing).
http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/

[123] Mike Koehler, Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement, 49 UC p.497 (he measures the impact of NPAs and DPAs on the quality of FCPA enforcement and concludes that NPAs and DPAs — while resulting in higher quantity of FCPA enforcement — result in lower quality of FCPA enforcement).

[124] Gabriel Markoff, Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 J. Bus. L. 797 (2013). (Based on a study of organizational convictions between 2001 and 2010 he argues that deferred prosecution agreements do not work better than actual corporate prosecutions and convictions).

Thanks to NTR induced voluntary disclosures, elaborate corporate global bribery schemes of breath-taking scale are becoming known. The very existence of these schemes, despite the now elaborate matrix of anti-corruption laws, is evidence of a gross failure of the rule of law. The political protections, given by governments that hold the monopoly on initiating the traditional criminal prosecution process, to domestic money-spinning domestic corporations, is an opportunistic and cynical trampling of the rule of law. Furthermore, the rule of law is not served where traditional criminal prosecution does not fully address the results of successful acts of foreign bribery, nor the full ramifications of the political, social and economic upheaval it causes. As such, while there is merit to rule-of-law punishment-focused criticisms of NTRs, there is also merit, from a rule-of-law perspective for encouraging the use of NTRs that promote self-reporting and cooperation that turns on the axis of *corruption prevention*.

5.2. NTRs and recidivism

NTRs are also criticised as being simply too easy on the corporation, as may be suggested by cases of recidivism. An oft cited example is the case of Pfizer. The New Yorker reports that Pfizer was hit with three successive NTRs, for illegal marketing, bribing doctors, and other crimes. On each occasion, the company paid a substantial fine and pledged to change—then returned to the same type of behaviour.[125]

This is of course of great concern, but as NTRs are developing, in use and content, this is a concern that is increasingly being adressed within the frameworks of charging policies.[126] The risk based assessments and forensic analysis of the root causes and weaknesses in the operations of the corporation that led to the foreign bribery from occuring (or *recurring)* as well as the previous history of the wrongdoer are factors that are taken into account before an is NTR is entered into. This is where a second pair of eys is essential. Where the behaviour of a corporation does not merit an NTR there has to be judicial oversight of the NTR process to ensure that the wrongdoer does not get one. Peer pressure from social and civil organisations, as well as the general public can be brought to bear on the decision to enter onto an NTR with a recidivist corporation. Furthermore, it must be noted that entering into an NTR is discretionary. The existence of an NTR regime does not remove the option of prosecuting individuals, top executives or other natural persons who are the 'master minds' of the bribery schemes.[127]

Other trends also work to encounrage compliance over recidivism.[128] First is changes to corporate culture: By taking a risk based approach to enforcement, NTRs, force corporations to look inwards, to review their internal structures, to perform root cause analysis, and identify gaps in governance. Corporations are committing to ethics and integrity 'beyond compliance.'[129] The resulting internal controls and bribery management systems put in place by the corporation, are designed to detect, manage and remediate acts bribery. In addition to this, the compliance programs and continuious monitoring required by NTR regimes, (especially after a company has been previously involved in a foreign bribery NTR) is of an escalating nature, monitors may be appointed and the corporation is, as it were, on quite an expensive probation.

Second is education: Training and raising awareness is a critical factor to tackling recidivism and corruption prevention. Fortnately, there is growing level of dedicated anti-corruption and

[125] Patrick Radden Keefe, Why Corrupt Bankers Avoid Jail, The New Yorker, July 24, 2917, https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail .
[126] Apart from the obvious fact that criminal laws have failed to prevent acts of bribery from occuring in the first place, nor have they seemed to act as any kind of restraint on corporations that have used foreign briebery as a regular business practice,
[127] See note 110 above on the requirement for individual accountability in the US NTR regime.
[128] See also Sharon Oded, Trumping Recidivism: Assessing the FCPA Corporate Enforcement Policy, Columbia Law Review Online, Vol 188, No 6, 2018.
[129] See the Agenda for Business Integrity, Partnering for Compliance. World Economic Forum, http://www3.weforum.org/docs/WEF_PACI_Community_Overview_pager_2019.pdf

compliance education programs[130] dedicated to raising the level of technical ability and building capacity with a cadre of well trained compliance professional across the globe. This is a domain that must be encouraged, funded and developed.

Third is the growing trend towards standardisation, new technologies and collective action: There is a move towards standardization of best practices is reflected in the growing discourse regarding common standard in non-trial resolutions.[131] This trend is also reflected in the newly introduced 2016 International Standards Orgnisation 37001 Antibribery Management standard for corporations.[132] Also on the increase is use of new technologies in anti-bribery monitoring leading to more and more robust compliance programs.[133] Collective action both between the public and private sectors but also between stakeholder groups is also resuting in new capcities.

5.3. Controls on NTRs: judicial oversight, transparency and predictability

It is clear that there must be controls in the NTR process, so they do not become yet another vehicle of impunity. NTRs must be' public, transparent and accountable to all parties' so as to 'resist capture by one interested group of actors, public or private.'[134] The rule of law discourse, and recidivism is a solemn reminder, that as NTRs gain in popularity and are effectively replacing the criminal trial in anti-foreign bribery enforcement, that there is an important role for the court of law as a guardian of the process.

The public has a right that enforcement and the administration of criminal justice should take place in an *open, transparent, fair and efficient manner*. The higher the degree to which NTRs fulfil such criteria, the more likely they are to be regarded as legitimate mechanisms of ensuring predictability of enforcement of anti-corruption laws in the eyes of the general public. [135] This is essential to promote the public trust as well as the confidence of shareholders, consumers, investors and business entities in the integrity of the market.[136] Rule of law considerations therefore suggest that there should be a consistent measure of judicial overview in the public interest of NTRs.

Publicity of NTRs can also translate to more legitimacy and less arbitrariness. There is a need for consistency in the amount of information that is given to the general public about the basis upon which an NTR was considered a suitable enforcement option and the motivation for the amounts reached in the settlement. Equally important is information about the extent to which efforts have been made to identify and compensate victims impacted by the acts of foreign

[130] Of particular note, is the UN International Anti-Corruption Academy estabilised by 51 UN States Parties that trains anti-corruption professionals from all over the globe.
[131] See Tina Søreide and Peter Solmssen, Recommendation regarding Non-trial Resolutions (or Negotiated Settlements) of Cases involving Foreign Bribery, https://www.nhh.no/en/research-centres/corporate-compliance-and-enforcement/guidelines-for-non-trial-resolutions/; CSO Letter to OECD on Principle for the Use of Non-Trial resolutions in Foreign bribery Cases, Dec 2018, https://uncaccoalition.org/cso-letter-to-oecd-on-principles-for-the-use-of-non-trial-resolutions-in-foreign-bribery-cases/; See generally, Abiola Makinwa and Tina Søreide, *Structured Criminal Settlements: Towards Global Standards in Structured Criminal Settlements for Corruption Offences* (The International Bar Association (IBA), Anti-Corruption Committee, Structured Criminal Settlements Sub-Committee 2018), http://www.oecd.org/corruption/anti-bribery/IBA-Structured-Settlements-Report-2018.pdf. Tina Soreide, Abiola Makinwa, (eds) Negotiated Settlement in Bribery Cases: A Principled Approach, Elgar, 2020.
[132] ISO 37001, Anti-bribery Management Systems, https://www.iso.org/iso-37001-anti-bribery-management.html .
[133] The US 2020 Guidance on Evaluating Compliance Programs includes question regarding the company's ability to learn from its own experience through, among other things, the use of data and technology. See note,114 above.
[134] Submission to the Financial Accountability Transparency and Integrity Panel, coordinated by the Independent Working Group on Illicit Financial Flows, a project of the Financial Transparency Coalition May 22, 2020.
[135] See further, Principle 31 of the United Nations Guiding Principles Implementing the United Nations 'protect, Respect, Remedy Framework'. Principle 31 requires non-judicial grievance mechanisms, both state-based and non-state based to be legitimate; accessible; predictable; equitable; transparent; rights compatible; a source of continuous learning and based on engagement and dialogue. http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf .
[136] US Principles of Federal Prosecution of Business Organizations Section 9-28.000 et seq.

bribery. This information belongs in the public sphere and helps to further the goals of corruption prevention.

Furthermore, there must be transparency about the framework for cooperation. Explicit guidelines about the factors that are taken into consideration, an indication of the credit to be obtained by complying with this framework, as well as, the interpretation of these factors by way of guidelines, lessens the room for arbitrariness in what can be a very political space.

Finally, it must also be emphasized that while NTRs may be a pragmatic new mechanism to overcome the limitations of traditional criminal prosecution of foreign bribery, they must not be seen as a get-out-of-jail card or lead to the decriminalization of the grievous crime of foreign bribery.

6. Filling the gaps: Victims, demand-side accountability

As more country are adopting NTR regimes, the gaps in this framework from a development perspective need urgent attention.[137] This section explores two key issues. The position of victims in the settlements discourse and demand-side bribery accountability. Suggestions are given of possibilities to include the interests of victims in settlements. Also, a potential opportunity to leverage the NTR framework to address the impunity of foreign bribe-takers in demand-side countries is suggested.

6.1. Position of 'victims" in the settlements discourse

As NTRs become the primary tool for sanctioning foreign bribery how are victims accommodated in this framework?[138] NTRs will typically occur between the prosecuting agency and the wrongdoing corporation. The ultimate victims are not a party to this process. This is not surprising as the NTR is a sanction directed at the wrongdoer by the prosecuting authority. Nonetheless, by encouraging *corruption prevention* and imposing stiff monetary fines and other conditionalities, as part of the settlement, the public interest, including the interest of victims, is being upheld. In this sense, NTRs in foreign bribery cases are arguably more attuned to the public interest and the development agenda rather than the 'eye for an eye' foundations of traditonal criminal justice.'

The importance to the public interest of the change in corporate behaviour catalyzed by NTRs should not be underestimated. In 2015, Justice Leveson, of the first NTR in England, noted, '*I have no doubt that Standard Bank has far better served its shareholders, its customers and its employees (as well as all those with whom it deals) by demonstrating its recognition of its serious failings* and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately enhancing its reputation and, in consequence, its business.'[139] In a somewhat similar vein, the OECD Working group on Bribery has noted that while it is difficult to quantify deterrence, 'The companies against which DPAs and NPAs have been brought have often undergone dramatic changes. For instance, prior to or following the entry of DPAs or NPAs, many companies have terminated personnel, including senior managers, established new codes of conduct and compliance policies and procedures,

[137] This is not an exhaustive list. An important concern is the fragmented landscape and the need for a principled approach to NTRs and settlements for foreign bribery offences. Readers are invited to consider the analysis presented by a global team of experts, in Tina Soreide, Abiola Makinwa, (eds) Negotiated Settlement in Bribery Cases: A Principled Approach, Elgar, 2020;
[138] See further, Abiola Makinwa, Panel on Giving Voice to Victims in Settlements and Asset Repatriation, UNCAC Implementation Review Group Briefing for NGOs Vienna, 23, June 2016 https://uncaccoalition.org/files/UNCAC-Speaking-Points-Abiola-Makinwa.pdf
[139] Serious Fraud Office v Standard Bank Plc Case No: U20150854, Crown Court at Southwark dated 30 November 2015

pledged not to use third-party agents, withdrawn from bids tainted by corruption, provided new and substantial resources to compliance and audit functions within their organizations, and instituted new training regimes. These companies, through their remediation efforts under DPAs and NPAs, have often fundamentally changed how they conduct businesses.'[140]

However, what about those big fines that go into treasuries in the north? Should there not be some compensation for the damage that was caused by the acts of foreign bribery that precipitated these monetary penalties? First, it should be clear the funds in question, are fines and monetary penalties imposed by a regulatory authority for the breach of sovereign law. They cannot be considered the property or assets[141] of a demand-side country. In this case there is no question of repatriation, nor is there a property claim on these monetary penalties. Indeed, the right of sovereign states to impose their own schedule of fines and monetary penalties is a growing problem of multiplicity of enforcement actions.[142] Any country that has criminalized foreign bribery and has a link to the transaction can impose its own sanctions framework.

However, there is merit to recognizing that there *is* a 'damages gap' in the settlement discourse. Western countries see an inflow into their treasuries of fines and penalties for foreign bribery that causes damage elsewhere. This 'damage elsewhere' should be part of the NTR discourse especially as it makes the consequences of corrupt activity by corporations more visible. NTR frameworks that acknowledge and direct attention to the consequences of foreign bribery, by including this in the factors that are required to enter into an NTR, give bribery a 'human face.'

Already, we see that there are provisions requiring the compensation victims in some NTR frameworks. Paragraph 7(2) of the UK Deferred Prosecution Agreements (DPA) Code of Practice Crime and Courts Act 2013 stipulates that 'It is particularly desirable that measures should be included that achieve redress for victims, such as payment of compensation.' Also in the UK, in June 2018, the Crown Prosecution Service (CPS), the National Crime Agency (NCA) and the Serious Fraud Office (SFO) of the United Kingdom have established a common framework to identify cases where compensation is appropriate in cases of economic crime occurring overseas to and 'act swiftly in those cases to return funds to the affected countries, companies or people'.[143]

It is noteworthy that in the UK's first deferred prosecution agreement, Standard Bank Plc., in addition to financial orders of US$25.2 million, paid the Government of Tanzania a further $6,000,000 plus interest in the amount of $1,046,196.58 in compensation.[144] Since 2014, the UK authorities have secured £49.2m total compensation for overseas victims.[145]

The impressive emerging victim's compensation framework in the UK NTR regime is also reflected in the newly introduced French CJIP (NTR) regimes that stipulates that the CJIP

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[140] See OECD United States Follow-U to Phase 3 Report and Recommendations December 2012 at http://www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf at p.20

[141] Within the meaning of Article 51 UNCAC which include suspicious fund (art 52), properties acquire through the commission of an offence (art 53) and other proceeds of crime. A fine including disgorgement imposed by a country pursuant to its domestic laws, does not constitute an asset of another country that can be returned, within the meaning of Art 51.

[142] This is a growing problem as more supply-side bribery countries are setting up NTR frameworks. However, this 'expanding pie' that is 'divided up in global settlements are not the property or asset of the demand-side countries where the foreign bribery took place. On multiple enforcement actions against the same wrongdoer by agencies from different country see Sharon Oded , the DOJs Anti-Pilng On Policy – Time to Reflect, in Tina Soreide, Abiola Makinwa, (eds) Negotiated Settlement in Bribery Cases: A Principled Approach, Elgar, 2020 p.228.

[143] SFO News Release, June 2018, New joint principles published to compensate victims of economic crime overseas, https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/; See the General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases. Available at https://www.sfo.gov.uk/download/general-principles-to-compensate-overseas-victims-including-affected-states-in-bribery-corruption-and-economic-crime-cases/; More recently The UK also published the Compensation Principles to Victims Outside the UK in April 2019. https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/compensation-principles-to-victims-outside-the-uk/

[144] SFO v. Standard Bank PLC (Now known as ICBC Standard Bank plc) Case No: U20150854, 30 Nov. 2015

[145] See SFO News Release, id.

agreement may include an obligation for the wrongdoing corporation to compensate the harm caused to the victims when victims could be identified.[146]

Another illustrative use of NTR regimes to address the interests of 'victims' is found in a World Bank NTR,[147] that led to the 2009 Siemens / World Bank Integrity Initiative. Under this agreement Siemens committed to fund projects and organizations fighting corruption and fraud through *collective action*, education and training with US$ 100 million over 15 years.[148] Again in, 2013, Siemens committed itself to providing funds, totalling 13.5 million euros over five years to international organizations, inter-governmental organizations, non-governmental organizations (NGOs), business associations, and academic institutions that support projects or other initiatives promoting good governance and the fight against corruption in a settlement with the European Investment Bank.[149] These NTRs serve the public interest by funding capacity building and reform in anti-corruption.

In 2014, Spalding proposed that agreements to contribute to anti-corruption initiatives should in fact become a standard line-item in NTR agreements.[150] He argued that such supplemental agreements would benefit the citizens of the bribed government; fund initiatives to remedy past bribery (to the extent possible) and to curb future bribery. Such a provision would 'reallocate' a portion of the penalty money, rather than relying on recovered assets. The benefit would be that such monies would go to private-sector organizations, NGOs and other anti-corruption programs, rather than demand-side bribery governments.[151]

In 2016, I proposed the use of *sleeping third party beneficiary clauses* to give 'victims' of corruption legal standing in any dispute or NTR arising out of a contract tainted by foreign bribery.[152] Contracts tainted by foreign bribery, entered into with government officials, will often have a public purpose. Third-party beneficiary clauses can serve to bring a predetermined group of ultimate beneficiaries (victims) within the purview of the underlying public contract. Inserting a sleeping third party beneficiary clause as a required standard clause in a government procurement contract or community development agreement,[153] this will require contract-seekers to identify and describe the ultimate beneficiaries of the contract. This gives the contract a human face and raises the stakes because, as a *sleeping* clause, it will only be triggered by a threshold such as corruption case or NTR relating to the said contract. From a *corruption prevention* perspective, the existence of the clause will serve as an incentive to all parties to the eventual contract *not* to trigger the clause and encourage them to refuse to engage in foreign bribery or other corrupt acts in the process of acquiring the contract. Very importantly, such a sleeping third party beneficiary clause will also give an identified class of

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[146] PNF and French Anti-Corruption Agency Joint Guidelines on the Implementation of the Convention Judiciare D'interet Public (Judicial Public Interest Agreement) (June 27, 2019, https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf at p.3.

[147] For more information about NTRs in Development Banks see Pascale Dubois, Kathleen Peters and Roberta Berzero, Settlements within the World Bank Group Sanctions System, in Tina Soreide, Abiola Makinwa, (eds) Negotiated Settlement in Bribery Cases: A Principled Approach, Elgar, 2020 at.p.95 – 124.

[148] See generally https://www.siemens.com/content/dam/internet/siemens-com/global/company/sustainability/compliance/collective-action/pdf/siemens-integrity-initiative-important-information.pdf.

[149] https://www.eib.org/en/press/news/eib-and-siemens-settlement-agreement

[150] See A. Spalding Guest Post: Reaching Bribery's Victims (Part 3) available at https://globalanticorruptionblog.com/2014/06/19/reaching-briberys-victims-part-3/ Spalding, referring to a paper by Andrew Brady, Restorative Justice for Multinational Corporations (March 3, 2014). Available at SSRN: http://ssrn.com/abstract=2403930), regulations.

[151] See Abiola Makinwa, Panel on Giving Voice to Victims in Settlements and Asset Repatriation, UNCAC Implementation Review Group Briefing for NGOs, Vienna, 23 June 2016, https://uncaccoalition.org/files/UNCAC-Speaking-Points-Abiola-Makinwa.pdf;

[152] Makinwa A.O., Empowering the Victims of Corruption: The Potential of Sleeping Third-Party Beneficiary Clauses, Open Society Foundations, 224 West 57th Street. New York, New York, 10019 USA, https://www.justiceinitiative.org/uploads/82ce7863-dfb2-41dc-b4db-49b8956fafb7/legal-remedies-7-abiola-20160802_0.pdf;

[153] See M. Maruca, 'Model Language for an Anticorruption Citizen Suit Provision in Community Development Agreements' The Global Anti-Corruption Blog, (September 11,2017) https://globalanticorruptionblog.com/2017/09/11/model-language-for-an-anticorruption-citizen-suit-provision-in-community-development-agreements/ .

persons a direct link to any NTR arising in respect to such a contract, and for example in the cases of the UK and France,[154] a right to compensation. [155]

Another interesting proposal to include the interest of victims in the NTR discourse is presented by the bill introduced in the US Congress to establish an Anti-Corruption Action Fund in NTR cases. The proposal suggests that if total criminal fines and penalties in excess of $50,000,000 are imposed against a person under the Foreign Corrupt Practices Act of 1977, whether pursuant to a criminal prosecution, enforcement proceeding, deferred prosecution agreement, non- prosecution agreement, or a declination to prosecute, the Attorney General shall impose an additional prevention payment equal to $5,000,000 against such person, which shall be deposited in the Anti-Corruption Action Fund… to be used to support anti-corruption work and initiatives. [156]

The above examples indicate that there is a space opening up for involvement of victims and civil society in questions of victim's compensation and the funding of remedial anti-corruption initiatives in the NTR discourse that can narrow the 'damages gap'. There is a lot to be done to develop these frameworks and to ensure that the very welcome provisions in the UK and French NTR frameworks, for example, do not become a dead letter. Furthermore, there should be some form of business and human rights arbitration to provide victims and corporations with an arbitration framework that takes the 'inequality of arms' into consideration in determining victims compensation or the level of funding for an anti-corruption initiative if no victims can be immediately identified.[157] This is where judicial oversight and the active involvement of civil society is required.

6.2. Demand-side accountability.

> *Participant 4: (00:13:20) One immediate benefit would be these foreign banks … being ready havens for stolen funds … these days you can be tracked, you can be traced …. At least let's take it step-by-step, you can be caught. The Abacha thing reminds us that even as tough as the Swiss were, they cracked under international pressure … the UK as well. …. If you step this up it actually gives impetus to the genuine fight against corruption on the demand-side. … Now that they see some kind of partnership developing with the supply side beginning to tighten its belt … yes, I think that it hands out hope … early days yet, but I think it hands out hope.*[158]

The systemic problems associated with anti-foreign bribery enforcement[159] are exacerbated on the demand-side of the foreign bribery transactions. The vast majority of foreign officials who demand these bribes continue to act with impunity, and, even when demand-side enforcement actions take place, these officials are rarely sanctioned. This leads to a loss of hope in the people of demand-side countries, as corruption seems to be rewarded. Foreign bribe-takers enrol their children in schools abroad, while domestic educational institutions in demand-side countries rot. Foreign bribe-takers have medical check-ups abroad while domestic hospitals do not possess even the most basic of equipment. Foreign bribe-takers own homes dotted across the

[154] See Section 3 above, The UK and France include Victims Compensation as a factor to be considered in their NTR regimes.
[155] R. Messick 'Why not Citizens Suits for Corrupt Procurements', Global Anti-Corruption Blog, October 5, 2016; https://globalanticorruptionblog.com/2016/10/05/why-not-citizen-suits-for-corrupt-procurements/.
[156] A bill to promote international efforts in combating corruption, kleptocracy, and illicit finance by foreign officials and other foreign persons, including through a new anti-corruption action fund, and for other purposes; New legislation pending in the U.S. Congress—Countering Russian and Other Overseas Kleptocracy (CROOK) Act, https://www.csce.gov/sites/helsinkicommission.house.gov/files/CROOK%20Act%20Senate.pdf. See also, Abigail Bellows, Why the U.S. Congress Should Pass the CROOK Act, Jan 2020, Global Anti-Corruption Blog, https://globalanticorruptionblog.com/tag/crook-act/
[157] As for example the framework provided by the 2019, Hague Rules on Business and Human Rights Arbitration Rules, https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/ of which I was a drafting member. These rules are fashioned on the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules but with modifications to address issues such as representation, panel composition, multiparty claims, transparency and costs that recur in the access to remedy by victims of human rights abuses discourse.
[158] A. Makinwa, Private Remedies for Corruption: Towards an International Framework, Eleven, International Publishing, 2013, p.57
[159] See Section 3 above.

globe, while domestic primary infrastructure, such as a constant supply of electricity and clean water is unavailable to the citizens they represent.

The OECD, in a 2018 report, notes that demand-side bribery criminal justice systems, are bedevilled by the same sanctioning challenges encountered by supply-side enforcement, namely, insufficient evidence, statute of limitations. In addition vagaries such as key documents disappearing from the Ministry associated with the bribe, and the slowness of the machinery of justice impede prosecution of demand-side bribe-takers.[160] The report notes that public officials are known to have been sanctioned in only one fifth of the schemes covered in the report; that the information flow between demand-side and supply-side enforcement authorities is often slow, and, that this exchange of information was not the source of foreign bribery detection, but rather the media and investigative journalists.[161] Other reasons given in the report for a lack of prosecution of foreign bribe-takers, was that in two cases sanctions were not imposed because the payments in questions were not deemed to be illegal under the demand-side country's laws, and, furthermore, that the machinery of justice seemed to be quite slow in some countries.[162] The report also noted that demand-side actions occurred mainly under criminal law. This means that a lack of political will to prosecute would translate to an impasse in enforcement, as the state holds the monopoly on instituting actions.[163]How can these systemic challenges be overcome? What lessons can we learn from the introduction of NTRs in Western countries to bypass these systemic anti-corruption enforcement challenges.

The logic of NTRs is to create incentives for compliance. However, the truth is, that the current situation in demand-side bribery countries, with struggling criminal justice systems, is a system that is stacked *against* compliance. There is little incentive not to join in the corruption 'all you can eat.'[164] Therefore this incentive structure has to change. A very preliminary outline of how the self-reporting and information disclosed in the supply-side NTRs can be leveraged to stem impunity on the demand-side of foreign bribery is as follows.

Towards an anti-bribery sanction block demand-side NTR regime[165]

A demand-side NTR regime will encourage compliance by stripping away elements of the traditional criminal prosecution process that have historically provided a layer of protection to wrongdoers. The suggested cooperation between supply-side and demand-side prosecutors creates a formidable response. The proposed *anti-bribery sanction block demand-side NTR* increases risk and provides the needed incentive for a rational choice for compliance.[166]

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[160]OECD (2018), Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End? www.oecd.org/corruption/foreign-bribery-enforcement-what-happens-to-the-public-officials-on-the-receiving-end.htm at p. 7.d

[161] Id.

[162] Id.

[163] See also Lucinda A. Low, Sarah R. Lamoree, and John London, The "Demand Side " of Transnational Briber y and Corruption: Why Leveling the Playing Field on the Supply Side Isn't Enough , 84 Fordham L. Rev. 563 (2015). Available at: https://ir.lawnet.fordham.edu/flr/vol84/iss2/9

[164] As noted by a participant in the course of my PhD research "(We need to find a way of making sure matters do not stay in courts for too long. … by the time the mill of justice is moving very fast people will think twice because right now when people want to do something … they sit down and tell themselves … 'don't worry – by the time we finish at the high court we will have spent some six years at the court of appeal by and large … another four years at the supreme court another seven years so in totality I can buy some 15 years successfully … go ahead and do it.' With that confidence they go ahead and perpetrate evil.'' Participant 7:(Tape 1, 00:42:37) . See A. Makinwa, Private Remedies for Corruption: (Note 98 above) at p.53

[165] Please note that this is a very preliminary outline and still to be fully developed.

[166] This idea of criminal activity based sanctions bars to entry are found in the Presidential Documents Federal Register/Vol. 69, No. 9/Wednesday, January 14, 2004/Presidential Documents 2287 Proclamation 7750 of January 12, 2004 To Suspend Entry as Immigrants or Nonimmigrants of Per-sons Engaged in or Benefiting from Corruption, https://shoppinglist.wikileaks.org/raw_data/embassy_procurement/vn/https vn.usembassy.gov_wp-content_uploads_sites_40_PROCLAMATION-EN.pdf ; the August 4, 2011 Presidential Proclamation--Suspension of Entry as Immigrants and Nonimmigrants of Persons Who Participate in Serious Human Rights and Humanitarian Law Violations and Other Abuses by President Barack Obama; The Global Magnitsky Human Rights Accountability Act (Pub. L. 114-328, Subtitle F, https://www.federalregister.gov/documents/2017/06/20/2017-12791/global-magnitsky-human-rights-accountability-act-report#:~:text=The%20Global%20Magnitsky%20Human%20Rights%20Accountability%20Act%20%28Pub.,certain%20human%

The stick: Self reporting and voluntary disclosure in on supply-side NTRs, leads to information about the foreign officials, third parties or other gate keepers who were involved or associated with the bribery scheme. This information should form the basis of an *automatic anti-bribery sanctions block* of all assets held by such gatekeepers or facilitators within the jurisdiction of the supply-side prosecuting agency. With the growing use of global settlements, this can be cross-blocking exercise across all jurisdictions that have a link to the corrupt transaction. This anti-bribery sanctions block can extend to refusal of visa rights, not only to the said facilitator, but also to their family members. This could include a blanket denial of visas for all purposes, including schooling, health, business, work, or any other reason.

The carrot: Depending on the level of cooperation by the alleged wrongdoer, demand-side prosecuting authorities may enter into a deferred prosecution, non-prosecution agreement or a declination. The *anti-bribery sanctions block* can be removed or softened, where the wrongdoing gatekeeper, third party facilitator or foreign bribery official, in question enters into a non-trial resolution with the domestic anti-corruption agencies or prosecutors. The terms of this NTR must be supported by all stakeholders including the correspondent supply-side agency. In this framework, the incentive for compliance is not contingent upon successfully prosecuting and punishing acts of foreign bribery, but, rather, on the extent to which the gatekeepers and/or bribe-takers cooperate with the prosecuting authorities.

Demand-side lack of political will: By creating a different set of incentives, the choice for compliance can be encouraged. Usable evidence of criminal activity can be collected and shared between supply-and demand- side agencies. Lack of technical capacity of the demand-side will be augmented by the sophistication and capacity of investigators on the supply-side. The criminal trial is replaced by faster moving negotiations between prosecutors and wrongdoers. The lack of criminalisation of foreign bribery on the demand-side country, or lack of political will to proceed against nationals, does not affect the ability of the supply-side prosecutor to impose an anti-bribery sanctions block. The incentive for demand-side cooperation by the wrongdoing gatekeeper, third party facilitator or foreign bribery official therefore remains intact.

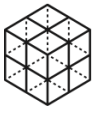
Information asymmetry: The briber always knows who the bribe-taker is. Information about the receiver of the bribe, by way of a third-party facilitator, or directly to the bribe taker is information that is disclosed or can be required as part of the voluntary disclosures made by corporations on the supply-side. This will reveal the channels that are used to facilitate the bribery of foreign officials and elites. It is important to note that the term foreign officials also include state-owned or controlled corporations.[167]

Supply-side-lack of political will: The delocalisation of foreign bribery enforcement as *US style NTRs* have spread and new offences of corporate criminal liability that reward cooperation with regulatory authorities for foreign bribery offences are introduced, this allows a multiplicity of countries, with a jurisdictional link to the corrupt transaction in question to trigger this anti-bribery sanction block demand-side NTR process.

Such an anti-bribery sanction block demand-side NTR, is very much in keeping with UNCAC's call that states parties should take measures to encourage persons who have participated in the commission of a bribery offence to supply useful information for investigation and evidentiary

20rights%20violations%20and%20acts%20of%20corruption; The recent UK the Global Human Rights Sanctions Regulations 2020, https://www.legislation.gov.uk/uksi/2020/680/made, are some prominent examples.

[167] U.S. v. Esquenazi, et al., 1:09-cr-21010 (S.D.Fla.2009)



purposes, or to contribute to depriving offenders of the proceeds bribery or recover such proceeds.[168]

An environment that addresses not just the offence of foreign bribery, but the contracts that are tainted by corruption and exchanges with bribe-takers, presents a riskier proposition that provides the necessary incentive for demand-side compliance. Such an environment can also help to isolate corrupt activity and serve as a form of containment of the flows of IFFs. [169] Containing IFFs can have a positive impact on the local economy where proceeds of graft are forced to remain within the jurisdiction in question because of the risk to assets transferred abroad. Such containment is a positive boost for domestic financial institutions and industry.

7. Conclusion and recommended steps

From a development perspective, *corruption prevention* should be the goal of effective anti-foreign bribery enforcement, as it is the more appropriate response to the full ramifications of the damage to the political, social and economic frameworks of developing countries that result from foreign bribery. With corruption, prevention is better than cure.

As this paper shows, there are several dimensions to NTRs including a development perspective. From this perspective, cooperation centred NTR anti-foreign bribery regimes are preferred to traditional criminal prosecution for two reasons: First, the mandatory cooperation of private sector entities or individuals as a necessary precursor to arriving at an NTR can help to overcome the profound information asymmetry challenges that handicap the best efforts of national authorities to detect and establish corporate criminal or administrative liability for acts of corruption that occur in secret, complex, multi-layered, multijurisdictional transactions. Second, rewarding cooperation by way of a an NTR, leverages the self-interest of alleged wrongdoers, by introducing new efficiencies, lessening risk, (reputational or otherwise), building the rational choice for compliance, and, by so doing, incentivizing public/private partnering in anti-corruption enforcement.

Rather than focusing on historically weak traditional attempts to punish corruption after the fact, States should develop criteria by which to stimulate, reward and assess socially valuable, corruption prevention actions by private sector entities and individuals. Specifically, actions such as adequate internal controls; robust anti-bribery agreements with third parties, agents, or other intermediaries; robust anti-bribery management systems and compliance programs; effective whistle blower systems, are examples of actions by private sector entities that can positively impact corruption prevention and foster a bottom-up approach to anti-corruption enforcement.

NTRs are fast becoming the primary mechanism of anti-bribery enforcement in cases of grand scale foreign bribery. There is an urgent need to address the 'damages gap' that leaves the 'ultimate victims' of corruption out in the cold. [170] Incorporating 'victims' into the settlements discourse emphasizes the human costs of corruption. Some countries already incorporate 'victims' in their settlement regimes. This should become a global approach. There are also

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[168] Article 37 UNCAC.

169 My case study in Nigeria gives anecdotal evidence of the impact of containment. Participant 3 remarked … 'People …..[are] afraid to take money abroad because they knew that Ribadu and his group would chase you …. as at that time everybody started keeping their money within Nigeria, the stock market was booming, real estate was booming, because they could not take the money out. The economy was improving. …You cannot keep the money in your bedroom; you still have to invest it …If the enforcement is really very effective particularly internationally, even if they have stolen the money they will invest the stolen money in Nigeria and it will still benefit the citizenry that is sure.' See A. Makinwa, Private Remedies for Corruption (Note 98 above) at p.61.

[170] See generally, Abiola Makinwa, Panel on Giving Voice to Victims in Settlements and Asset Repatriation, UNCAC Implementation Review Group Briefing for NGOs, Vienna, 23 June 2016, https://uncaccoalition.org/files/UNCAC-Speaking-Points-Abiola-Makinwa.pdf ; See also A. Spalding Guest Post: Reaching Bribery's Victims (Part 3) available at https://globalanticorruptionblog.com/2014/06/19/reaching-briberys-victims-part-3/ .

examples listed in this paper on how to include the victims interest or victim-friendly initiatives as part of the final settlement. This should also become accepted global practice.

Finally, a bribe is a means to an end and not an end in itself. Addressing the consequences of successful acts of bribery is an important aspect of taking the money out of the crime. On the supply-side and demand-side of bribery, NTRs can be sued to expose channels of corrupt money flows and set up disgorgement, restitution and other sanctions to deter corrupt activity. Developing a framework that leverages voluntary disclosures made in supply-side countries to facilitate demand-side NTRs as described in the short proposal in section 6 of this paper is, it is respectfully submitted, a step in the right direction. An incentive for compliance has to be introduced, by creating a credible 'stick'.

Finally, as NTRs move to the center of anti-foreign bribery enforcement, it is important that the above described development dividends of NTRs become a part of policy making, institutional and legal reform. To this end this paper suggests the following, short term, medium term and long-term goals.

Short term goal: Policy paper on 'Leveraging NTRs for foreign bribery offences in the sustainable development agenda'.

A FACTI Green Paper and consultation process on the use of NTRs for foreign bribery offences in the sustainable development agenda. This green paper will clarify the contributions that can flow from NTR corruption prevention strategies and what needs to be done to achieve them. It will clarify the minimum content of NTR frameworks *as well as explore* policy positions on the issue of *Judicial Overview* and *Transparency* of NTRs. As such the following steps are suggested:

- A FACTI Green Paper on Leveraging NTRs for the sustainable development agenda
- A consultation based on the Green Paper on Leveraging NTRs for the development agenda
- A conference of stakeholders

The final outcome of this process will be a White Paper on *Leveraging NTRs for Foreign Bribery Offences in the Sustainable Development Agenda – A Policy Framewor*k

Medium term: Structurally integrating victims' compensation into NTR regimes

Not all countries include the explicit requirement that compensation to victims be made in their NTR regimes. Further research and a report on how to promote the inclusion of victim's compensation in their anti-foreign laws and guidelines is to be recommended. The paper also highlights some proposals of mechanisms by way of which victims can be included in NTRs that can be further explored.

Long term: Linking supply-side NTRs to demand-side foreign bribery prosecution

A preliminary proposal to develop a prosecutorial framework that leverages voluntary disclosures from supply-side NTRs to support the development of a demand-side NTR process is made in this paper. Developing a credible 'stick' that can facilitate demand-side cooperation is an important area for policy consideration and research.